No. 85-1354

Supreme Court, U.S.
FILED
FEB 10 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

ROBERT DiBERNARDO and THEODORE ROTHSTEIN,

Petitioners,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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February 10, 1986

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QUESTIONS PRESENTED

1. Where an indictment in a First Amendment case is based upon testimony containing continual, highly prejudicial and unfounded references to organized crime, force and violence, as well as pirating of copyrighted material, sale of automatic weapons, loan sharking and extortion, which were totally irrelevant to the crimes under review, is dismissal of the indictment barred because the prosecutorial misconduct may have been unintentional?

2. Where an indictment is dismissed for *Mesarosh** taint, because it is based upon the testimony of one with perjurious propensities who is totally unworthy of belief, may the Circuit Court ignore *Mesarosh* and reverse because there is no specific finding of perjury?

3. Where the prosecutor deliberately deceives the district court as to the evidence presented to the grand jury, so that the district court cannot rule on the basis of petitioners' claim, does this purposeful falsification constitute intentional prosecutorial misconduct because it effectively strips the court of its ability to supervise the grand jury?

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* *Mesarosh v. United States*, 352 U.S. 1 (1956)

PARTIES TO THE PROCEEDINGS BELOW

There has been no change in the parties to the proceedings below.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The petitioners Robert DiBernardo and Theodore Rothstein respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit, entered in the above-entitled proceeding on November 13, 1985.

OPINIONS BELOW

The opinion of the Court of Appeals for the Eleventh Circuit is reported at 775 F.2d 1470. The two opinions of the District Court for the Southern District of Florida are reported at 552 F.Supp. 1315 and 561 F.Supp. 783. The June 27, 1983 district court order dismissing the superseding indictment against petitioners is unreported. They are all reprinted as Appendices A, B, C, and D, respectively, commencing with A-1.

JURISDICTION

In February 1980 the Government indicted 45 persons including petitioners, alleging a nationwide conspiracy to transport obscene materials in interstate commerce (18 U.S.C. Sections 371 and 1465). On October 15, 1980 the same grand jury returned 16 superseding indictments against the same individuals charging 16 different groups with essentially the same offenses.

On December 7, 1981 Robert DiBernardo and Theodore Rothstein were found guilty of conspiracy and the interstate transportation of obscene materials (two feature films and eight 8 mm films). Each of the petitioners was sentenced to five years imprisonment and fined $12,500.

Following petitioners' convictions, in February 1982 counsel discovered that FBI agent Patrick Livingston (virtually the only grand jury witness who testified against petitioners) was arrested for shoplifting in Kentucky. Subsequently he filed false affidavits with the FBI, which was investigating the incident. The District Court for the Southern District of Florida (Spellman, J.), after a lengthy hearing investigating Patrick Livingston's testimony before the grand jury that indicted the petitioners, dismissed without prejudice the indictments against petitioners. See opinions of December 1982, March 1983, and order of June 1983.

The district court stated in its order that if the dismissals were reversed, it would grant a new trial. Invoking 18 U.S.C. Section 3731, the U.S. Attorney appealed from that part of the order

which dismissed the indictment. Petitioners cross-appealed seeking dismissal with prejudice. On November 13, 1985 the Eleventh Circuit reversed the district court's order of dismissal.

On January 2, 1986 Mr. Justice Lewis F. Powell, Jr. ordered that the time for filing this petition for writ of certiorari be extended to and including February 11, 1986.

The jurisdiction of this Court to review the judgment of the Eleventh Circuit is invoked under 28 U.S.C. Sec. 1254(1).

FINALITY

The Eleventh Circuit's decision satisfies this court's test of finality. Finality is to be given a "practical rather than a technical construction." *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 at 546 (1949); *Gillespie v. United States Steel Corp.*, 379 U.S. 148 at 152 (1964). This case involves clear-cut issues of law which will otherwise elude review and have consequences far beyond the facts of this case. Review is appropriate. See *Estelle v. Gamble*, 429 U.S. 97 (1976); *Abney v. United States*, 431 U.S. 651 (1977); *Supreme Court Practice*, Stern and Gressman, Sec. 4.19 (1978).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the First and Fifth Amendments to the United States Constitution, as well as 18 U.S.C. secs. 371, 1462 and 1465 and rules 6(e) and 12 of the Federal Rules of Criminal Procedure. The pertinent provisions of the United States Constitution and Federal Rules of Criminal Procedure are reprinted as Appendices E and F respectively.

SUMMARY OF THE CASE

Since the history of this case spans five years and the record is voluminous a summary of the case is helpful.

The grand jury ostensibly indicted petitioners for violating federal obscenity laws. But the district court found as uncontradicted fact that the grand jury returned the indictment because of "highly prejudicial evidence totally unrelated ***" to the conspiracy charges against petitioners. This evidence had absolutely "no bearing" on the issue of the films' alleged obscenity. Instead, the grand jury heard endless evidence of mafia control, copyright infringement, extortion, use of automatic weapons, and child pornography, all of which was without basis and irrelevant to the superseding indictment. (A-18, 34-35 and n. 9, 39-40, 45-46).

Virtually the only grand jury testimony against petitioners was that of FBI agent Patrick Livingston. The district court, relying on *Mesarosh v. United States*, 352 U.S. 1 (1956), also found that the testimony of Mr. Livingston was totally unworthy of belief. (A- 30-33, 39). Based on a combination of these two factors Judge Spellman concluded the grand jury "had become affected with corruption in the true biblical sense of that word" and dismissed the indictments. (A-48).

While not questioning the district court's finding of fact regarding mafia control and other forms of taint, the Eleventh Circuit held that absent intentional prosecutorial misconduct dismissal is not warranted. In direct contravention of the decisions of many circuit courts, it focused on culpability of the prosecutor rather than impact on the grand jury.

Turning to the matter of Patrick Livingston's tainted testimony, the Eleventh Circuit held that, absent affirmative misconduct and a specific finding of actual perjury, an indictment cannot be dismissed. However, the Eleventh Circuit completely ignored this Court's decision in *Mesarosh*. 352 U.S. 1. The circuit court does not disagree with the district court's finding based on

Mesarosh that Mr. Livingston's credibility was "totally discredited." Instead it relies on decisions which do not remotely deal with *Mesarosh*.

The Eleventh Circuit has effectively emasculated the grand jury's most basic and constitutional function of protecting citizens from unwarranted or tainted indictments. For this reason alone, this constantly recurring problem of grand jury supervision should be addressed by this Court.

In addition, the record reveals intentional prosecutorial misconduct affecting the integrity of the judicial process. The prosecutor with full knowledge of the facts deliberately misled the district court on two critical matters. It was only the fortuity that Mr. Livingston was caught shoplifting and giving false affidavits to the FBI that brought these matters to light.

Citizens should not be forced to defend themselves for three years, first against what we now know is an admittedly baseless indictment and illegal seizures based on it, and then against an indictment predicated on passion and prejudice without basis and founded on the testimony of an FBI agent unworthy of belief.

STATEMENT OF FACTS

Grand Jury Investigation-Prejudicial Taint

In the Summer of 1977 the FBI launched an undercover investigation of all the major publishers and distributors of adult films and magazines throughout the nation. Two Special Agents, Patrick Livingston and Bruce Ellavsky, posed as dealers in sexually oriented material in Miami, Florida. From June 19, 1979 to February 11, 1980 the grand jurors heard testimony regarding an alleged nationwide conspiracy to transport obscene material across state lines.

They also heard streams of testimony which, as the district court described it, involved " *numerous*," "*continual*" and "*repeated*" statements of mafia control, force and violence,

organized crime, pirating of copyrighted material, as well as extortion, loan sharking, use of automatic weapons and child pornography. (A-18, 34-35 and n. 9, 39-40, 45-46, emphasis supplied). Mr. Livingston made endless graphic references to bombings of offices, beating people with a baseball bat, cutting people with a knife, as well as pirating of films, sale of machine guns and child pornography. It is difficult to imagine more inflammatory evidence. None of this evidence was relevant to the indictment returned against the petitioners.

The record further shows without question that FBI agent Livingston made it appear that all of the targets, including petitioners, were inextricably interwoven with the foregoing. By way of one example only, speaking of Star Distributors, owned and operated by petitioners, Patrick Livingston said:

> ". . . when you are dealing with a particular distributor in New York, for example, Star, you are dealing with one family of the mafia." (7/19/79 T. p. 58).[1]

Not only was all of the foregoing irrelevant to the superseding indictment, but as to petitioners it was absolutely without foundation. This star-crossed prosecution was doomed from its start.

The February 1980 Indictment

The first indictment charged virtually every major distributor of adult material throughout the United States with a single, massive conspiracy to violate the federal obscenity laws. The petitioners challenged the sufficiency of this monstrous indictment, involving 45 individual defendants.

Petitioners' moving papers demonstrated that, even aside from the taint of mafia control, etc., and confining oneself to "obscenity," a false picture had been presented and that there was no

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[1] "T" stands for transcript of grand jury minutes.

overall conspiracy.[2] The prosecutor, at first, attempted to defend the indictment, but eventually admitted a "mistake" had been made (2 5th Supp.R. at p. 3513).[3] Subsequently, on October 15, 1980 the same grand jury, with at most two days of deliberation and based principally on the same "mafia" type evidence previously presented, returned 16 separate indictments.

The Agent's Mental Instability and the Brady Demand for Material Withheld

Counsel for petitioners asked, under *Brady v. Maryland*, 373 U.S. 83 (1963), whether the prosecution possessed any evidence of "mental instability" concerning any prosecution witness.[4] Before this very demand had been made, one of Mr. Livingston's superior officers, Arthur Nehrbass, in March 1980 had expressed "concern for the mental health of Special Agent [Patrick] Livingston."[5]

Mr. Nehrbass testified and the record shows that the prosecutor and Miami FBI agents "shortly after the return" of the first indictment were all well aware of Mr. Livingston's bizarre behavior and mental difficulties.[6]

Throughout 1980 Agent Nehrbass still had "a gnawing feeling that perhaps Pat needed help" and he never resolved that "doubt." There was further consultation with Dr. Marlowe, a

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[2] June 1980 Omnibus Motion, pp. 112-115, Dk. 426; D'Apice Dismissal Memo, 6 R. 1324, Dk. 517, pp. 95-105. The foregoing are references to the record as it was filed in the Eleventh Circuit.

[3] That first "mistaken" indictment also led to massive seizures which Judge Spellman held patently unlawful (18 R.4012-4103D). At Star Distributors the FBI seized 16,000 documents, about 60 pages of which could be deemed relevant. Star had to pay $6,000 for copies of its own records illegally seized (1 5th Supp.R. at pp. 186-188).

[4] Defs' June 1980 Omnibus Motion, 1 5th Supp.R. at p. 151.

[5] Defs' Ex. 8 in evidence, 21 3rd Supp.R. 238-239; A-22. "Defs' Ex." means defendants' exhibits in the district court Livingston hearing and as identified in the Eleventh Circuit.

[6] A-22-23, 35; 21 3rd Supp.R. at 242, 284-5; see also 23 3rd Supp.R. at 576-7.

psychiatrist, about Livingston's "apparent deteriorating personality and his bizarre behavior" and acknowledgement that agent Livingston "needed professional help." Mr. Livingston thereafter consulted another psychiatrist.[7] Despite specific *Brady* demands, the prosecutor failed to disclose Mr. Livingston's mental problems.

The Prosecutor Falsely Denied The Fact of Mafia Control, Violence, etc. Evidence Before the Grand Jury

Petitioners from the outset urged that the prosecutor presented endless evidence of violence, illegal duplicating of films, and copyright infringements to the grand jury.[8] The prosecutor denied this, asserting that petitioners were raising "a speculative and unsupported allegation" which should be:

> "**** rejected *as mere conjecture and speculation, devoid of any basis* or support in the record." (15 R. 3293 at 3316 and 3333, emphasis added).

After the superseding indictments were returned by the same grand jury, the petitioners once again reiterated this very same claim. (1 5th Supp.R. at pp. 255, 264-277). The prosecutor knew that petitioners' assertions were true. Nonetheless, with intent that the district court rely thereon, he *again* falsely stated that petitioners' assertions were "unsubstantiated" and "conjectures" and that, therefore, there was no basis for the court to explore the petitioners' claims of misconduct before the grand jury.[9] (15 R. 3302).

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[7] 21 3rd Supp.R. 265, 269. See also 26 3rd Supp.R. 1227, Pets' Livingston Hearing Exhibits 12ee, 12 v.2, and 16; A-23.

[8] Defs' June 1980 Omnibus Motion, 1 5th Supp.R. at pp. 120-122 and D'Apice Law Memo Pt. VI, 6 R. 1324.

[9] The prosecutor's December 22, 1980 answering papers stated:

"The defendants contend that the grand jury was tainted by evidence relating to crimes not involved in this case... *Such an unsubstantiated statement by defense counsel has no basis.* The defendants have not come forth with any substantial information ... defense counsel are . . . confused. Hunches or conjectures serve no basis for disclosure of grand jury minutes" (15 R. 3302, emphasis supplied; see also 1 5th Supp.R. at 427-439).

As a consequence of the prosecutor's misleading representations, the district court denied the petitioners' motion on March 17, 1981. (18 R. 4146A at 4146B-4146C). On the eve of trial petitioners renewed this motion and on oral argument the prosecutor for a third time falsely denied the truth of their claim. (11 3rd Supp.R. 18-40).

The Petitioners' Trial

The DiBernardo-Rothstein trial commenced on May 18, 1981 and ended on June 12, 1981 when the jury, after deliberating for three days, convicted the petitioners on each count. There was absolutely no evidence that petitioners had shipped or aided and abetted in the transportation of the films made by one Andre D'Apice. To prove shipment the Government relied on the *Pinkerton* conspiracy doctrine. The only direct evidence of Mr. DiBernardo's conspiracy consisted of his supposed one line statement to Agent Livingston.[10]

In the subsequent January 1982 in camera proceedings concerning Livingston, both the prosecutor and Judge Spellman acknowledged that Mr. Livingston's questionable one line statement was the only evidence to link Mr. DiBernardo to the conspiracy (1/26/82 Hearing at pp. 9-10). The direct testimony against Mr. Rothstein was equally sparse.[11]

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[10] *Pinkerton v. United States*, 328 U.S. 640 (1946) (proof of conspiracy was proof of shipment). That single statement DiBernardo allegedly made to agent Livingston was: "See Andre and Teddy, they speak for me." (1/26/82 Hearing at pp. 9-10). This statement was not only uncorroborated by Agent Ellavsky, but it was completely at odds with Mr. Livingston's earlier FBI 302 Report and grand jury testimony.

On a severance motion Mr. D'Apice confirmed to the court that petitioners had nothing to do with any sale to the undercover agents and that there was no conspiracy (4 3rd Supp.R. p. 704).

[11] In an 18 month period the only testimony involving the FBI and Theodore Rothstein consisted of 2 untaped and 1 taped conversation (November 22, 1978) with Agent Livingston. The untaped conversations were not corroborated by

(footnote continued)

The Livingston Hearing-Livingston Found Totally Unworthy of Belief

On February 12, 1982 the prosecutor notified all defense counsel that on November 10, 1981 Special Agent Patrick J. Livingston was arrested and charged with felony-grand theft for stealing clothing from a department store.[12]

Petitioners and all other defendants moved for discovery, to dismiss the superseding indictments, and petitioners moved for a new trial. In June and September 1982, the district court conducted an exhaustive inquiry.

It is important to understand that the circuit court does not question the district court finding that agent Livingston's testimony was unworthy of belief. We catalogue only some of the lower court's findings and the key evidence:

(1) Patrick Livingston lied to the security officer at Bacon's Department Store and the arresting officers who caught him stealing the articles of clothing. (A- 24);

(2) Patrick Livingston "lied about the shoplifting event" in his affidavit to his FBI superior. (A-25);

(3) Special Agent Revell of the Washington FBI office stated with reference to one of Mr. Livingston's explanations for falsifying his identification that it was "not worthy of belief"[13];

Bruce Ellavsky (9 3rd. Supp.R. 1449-1454). In the taped conversation, Mr. Rothstein told Mr. Livingston five times he had nothing to do with D'Apice's business or the sale of films. (10 3rd Supp.R. 1651-1654 at 1651-1653). The Government concedes that Livingston's testimony had an impact on Rothstein equal to the impact on DiBernardo (23 R. 5288 at 5297-5299; Nov. 12, 1982 argument at pp. 35-37).

[12] 20 R. 4384-4386.

[13] Pets' Ex. 12 LL p. 2.

(4) Special Agent Yelvington, Livingston's direct superior in Kentucky, stated that without independent knowledge of the facts, he would not believe Livingston[14];

(5) Patrick Livingston lied to each of the doctors appointed by the court to investigate his mental compentency as well as a psychiatrist appointed by the FBI[15];

(6) Dr. William Corwin, the psychiatrist selected by the court, testified with "reasonable psychiatric *probability*" that during the past five years, given a choice, Patrick Livingston would be more likely to give testimony favorable to himself and the FBI rather than tell the truth[16];

(7) Dr. Dennis Koson also stated with "reasonable psychiatric probability" that in his professional opinion Mr. Livingston has "a propensity or a tendency to lie ****" and that it would be difficult for a jury to know he was lying.[17]

Based on the entire record, including the psychiatric testimony premised on reasonable psychiatric probabilities, the district court found that Mr. Livingston has a "great propensity to lie" and reached the "sad but inevitable conclusion based on the evidence and its personal observation that [Mr. Livingston] would lie when the truth would serve him best" and has "perjurious propensities." The district court concluded that the grand jury proceedings were contaminated as a result of Mr. Livingston's "numerous and varied lies" (A-26-27, 30, 32, 39).

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[14] A-30.

[15] A-28-29.

[16] A-28-29, emphasis supplied.

[17] A-29.

Judge Spellman relied on *Mesarosh*, and his June 27, 1983 dismissal order specifically held that the Livingston taint was predicated on "credibility *Mesarosh* reasoning" (A- 51).[18]

[18] In that same order Judge Spellman also found that there was "significant inability" to corroborate certain key statements of Mr. Livingston. We mention this lest the U.S. Attorney again tries to make it appear that Agent Ellavsky corroborated Mr. Livingston. Agent Livingston was the only grand jury witness of any consequence against petitioners, and there was no corroboration.

REASONS FOR GRANTING WRIT

1. A Grand Jury Indictment Which Is Based Upon Highly Prejudicial, Unfounded and Irrelevant Evidence Should Be Dismissed Even Where It Is Claimed That Prosecutorial Misconduct Is Unintentional.

The Fifth Amendment requires that an indictment for infamous crimes be returned by a grand jury to preserve a fair method of initiating criminal charges. It has two functions which were summarized aptly by the district court:

> "The historic role of the grand jury is to shield the innocent against arbitrary and unfounded charges and to determine if there is probable cause to believe a crime has been committed. *United States v. Calandra*, 414 U.S. 338, 342-343, ***; *United States v. Dionisio*, 410 U.S. 1, 16-17 ***; *Ealy v. Littlejohn*, 569 F.2d 219, 226 (5th Cir. 1978)." (A-36).

The district court, further relying on *Wood v.Georgia*, 370 U.S. 375, 390 (1962), pointed out that where as here there are "delicate first amendment issues ***" it is important that "the real issues not become obscured *** [and that there be an] informed grand jury" (A-36-37).

The district court found as undisputed fact that the grand jury was not informed, was biased, and returned an indictment based on evidence which was irrelevant and highly prejudicial. (A-18, 34-35 and n. 9, 39-40, 45-46).

This result cannot be justified, certainly not in a First Amendment case, simply because there was no intentional prosecutorial misconduct. By its holding, the Eleventh Circuit effectively strips citizens of the protective shield that the grand jury was designed to afford. The Eleventh Circuit holding is in conflict with the basic grand jury principles announced by this Court, and the decisions of many other circuit courts.

The district court's analysis adheres to the rule firmly established by this Court, that the touchstone of due process is the fairness

of the proceeding, not the culpability of the prosecutor. *Smith v. Phillips*, 455 U.S. 209, 219 (1982); *United States v. Agurs*, 427 U.S. 97, 110 (1976) ("[n]or do we believe the constitutional obligation [to disclose unfavorable information] is measured by the moral culpability, or the willfulness, of the prosecutor.").[19]

The district court's holding further conforms to the decisions of many courts which, in direct conflict with the Eleventh Circuit, correctly focus on grand jury impact and not the prosecutor's intentional misconduct. These courts have held that indictments will be dismissed where grand jurors have been misled or prejudiced even if the injury resulted from a prosecutor's "unintentional" or "inadvertent" error. *United States v. Estepa*, 471 F.2d 1132, 1136-1137 (2d Cir. 1972); *United States v. Samango*, 607 F.2d 877, 882 (9th Cir. 1979); *United States v. Hogan*, 712 F.2d 757, 762 (2d Cir. 1983); *United States v. Asdrubal-Herrera*, 470 F.Supp. 939 at 942-943 (N.D.Ill. 1979) (cited with approval by *Hogan*); *United States v. Carcaise*, 442 F.Supp. 1209, 1213 (M.D. Fla. 1978); *United States v. Phillips Petroleum Co.*, 435 F.Supp. 610 at 614-616, 621 (N.D. Okla. 1977) (unintentional failure to inform the grand jury).[20]

The unifying theme of these cases is that the impropriety of a prosecutor's conduct must be measured by the impact on the grand jury — not his intent. For instance, in *Estepa* the Second Circuit dismissed an indictment where excessive hearsay was presented to a grand jury without an adequate explanation of its suspect nature. There the court held that the indictment had

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[19] *United States v. Bagley*, 473 U.S. ____, 105 S.Ct. 3375 (1985) altered the *Agurs* standard for *Brady* rule compliance. The change, however, focuses on result, not the intent or bad faith of the prosecutor. There are a whole host of situations where the court looks to the effect, not intent (e.g. harmless or plain error rule).

[20] Even where the courts have refused to dismiss indictments, they still recognize that it is the effect on the grand jury, not the intent of the prosecutor that controls. See, e.g., *United States v. Al Mudarris*, 695 F.2d 1182 at 1188 (9th Cir. 1983) (as *Samango* noted "even unintentional misconduct can cause improper influence and usurpation of the grand jury's role").

to be dismissed whether the prosecutor erred "wittingly or unwittingly." 471 F.2d at 1137.

In *Samango*, the Ninth Circuit, after stating that deliberate introduction of perjured testimony was a flagrant example of prosecutorial misconduct, *also* held:

> ". . .other prosecutorial behavior, even if *unintentional*, can also cause improper influence and usurpation of the grand jury's role." 607 F.2d at 882 (emphasis added).

The *Samango* court held that the "cumulative effect of the above errors and indiscretions *** [produced] a biased grand jury" requiring a dismissal of the indictment. 607 F.2d at 884. This is exactly the conclusion reached by Judge Spellman.

In *Hogan*, the Second Circuit dismissed the indictment because of the overall impact on the grand jury and without regard to whether the biased presentation was inadvertent or unintentional. The court stressed:

> "While the factual misstatements in the agents' testimony may have been *inadvertent*, as the government now argues, the fact remains that the appellants were prejudiced by the misstatements of important facts and the grand jury's independent role was impaired." 712 F.2d at 762 (emphasis supplied).

The *Hogan* court, quoting *Samango* (607 F.2d at 822) and citing *Asdrubal-Herrera* (470 F.Supp. at 943), held that "**** prosecutorial behavior, even if *unintentional*, can also cause improper influence ***" and the Government's intent was immaterial. 712 F.2d at 762 (emphasis supplied).[21]

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[21] In *United States v. Asdrubal-Herrera, supra*, a false impression was created by presenting proof to the grand jury that a defendant was involved with illegal firearms even though he was only charged with a violation of the immigration laws. There, the court specifically held that the prosecutor's conduct

(footnote continued)

United States v. Serubo, 604 F.2d 807 (3rd Cir. 1979) is also instructive. In *Serubo*, and unlike our case, there were two different grand juries. The Third Circuit found it inexcusable that repeated references to "Cosa Nostra hatchet men" occurred before the first grand jury. Significantly, the Third Circuit remanded to determine whether the second and different grand jury was truly independent and "unaffected by [the prosecutor's] effort to create bias or prejudice." 604 F.2d 818. In our case, too, there should have been a second grand jury.

United States v. Calandra, 414 U.S. 338 (1974), and *Costello v. United States*, 350 U.S. 359 (1956), relied on by the Eleventh Circuit, do not remotely deal with these issues. Indeed, the Eleventh Circuit's reliance on these cases and the conflicting decisions of other circuits emphasize the need for guidance from this Court.

No one questions the *Calandra* holding that the grand jury has broad investigative powers. Petitioners do not contend that *Calandra* prohibits an investigation into mafia control, or violence or pirating of films, or child pornography, or drug dealing, or extortion, or laundering of money, or the sale of automatic weapons. However, *Calandra* does not permit an indictment to be based on these matters where in fact they are untrue, prejudicial, or completely irrelevant to the First Amendment charges.

Costello simply held that a grand jury indictment could be based on hearsay. The Eleventh Circuit cites *Costello* and focuses on the absence of any limiting instructions as if this case involved some technical grand jury error with which a district court should not become embroiled.

This case does not involve a claim of technical error. What is at stake is a citizen's right to the protection of a grand jury.

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was not "egregious" but concluded that under the totality of the circumstances "the negligent conduct of the United States. . .polluted 'the waters of justice'" necessitating a dismissal of the indictment to protect the judicial process, *citing, inter alia, Mesarosh v. United States*, 352 U.S. 1 at 14 (1956). 470 F.Supp. at 942-943.

If this Court does not intervene and act to shield citizens from unfounded and biased indictments, tainted by misinformation and highly prejudicial evidence, then we are well on our way to losing one of the most formidable bulwarks against governmental misconduct.

2. Additionally, An Indictment Should Not Be Based On Testimony Of A Person Found To Be Totally Unworthy Of Belief.

As a second basis for dimissal, the district court relied on *Mesarosh*, 352 U.S. 1. As Judge Spellman emphasized, *Mesarosh* held there was taint because the "credibility" of Mr. Mazzei, the Government's key witness, was "*wholly discredited*" by matters arising in "other proceedings" after the *Mesarosh* petitioners' trial. There was no finding of trial perjury. The Government asserted that Mr. Mazzei's *Mesarosh* trial testimony was "truthful" and that "the untrue subsequent statements may have [only] been caused by psychiatric problems which arose subsequent to [the Mesorash] trial." 352 U.S. at 4, 8-9; A-31.

The district court noted the *Mesarosh* holding that the discharged jury could no longer act (just as the indicting grand jury could no longer act) and quoted *Mesarosh*'s holding that "*(t)he untainted administration of justice is certainly one of the most cherished* *** *institutions* [and] **** one of our proudest boasts." The district court then held that "the *Mesarosh* reasoning" is equally applicable to the grand jury and to remove the taint the government should "go before a new grand jury *** with full disclosure of all the facts." (A- 31-33, emphasis supplied by the district court).

Neither the Eleventh Circuit nor any other court has to our knowledge held that the untainted administration of justice is a principle applicable only at the trial level, and not applicable to a grand jury. While decisions applying *Mesarosh* to grand jury proceedings are sparse, when the occasion arises district courts, relying in part on *Mesarosh*, have dismissed grand jury indictments. *Asdrubal-Herrera*, 470 F.Supp. at 943; *United States v. Gallo*, 394 F.Supp. 310 at 315 (D.Conn. 1975).

The district court's extensive reliance on *Mesarosh* here shows it found that Mr. Livingston was unworthy of belief. The circuit court does not challenge the district court's findings.[22] Significantly, the circuit court reverses the district court without even addressing *Mesarosh*, upon which the district court relied.

Instead the Eleventh Circuit focuses on the absence of a specific finding of actual perjury by Agent Livingston and relies, inter alia, on *United States v. Hyder*, 732 F.2d 841, 845 (11th Cir. 1984) and *United States v. Sullivan*, 578 F.2d 121, 124 (5th Cir. 1978). It holds that absent "intentional misconduct" of the prosecutor or actual perjury "the fact that Agent Livingston may have inadvertently given false testimony to the grand jury" was immaterial and, quoting *Sullivan*, an indictment is not "flawed simply because it is based on testimony that later may prove questionable." In footnote 11 the court points out that Livingston probably lacked "the requisite criminal intent to commit perjury." (A-8-9 and nn. 10, 11).

However, neither *Hyder*, *Sullivan*, *United States v. Guillette*, 547 F.2d 743, 753 (2nd Cir. 1976), nor any other case cited by the Eleventh Circuit mentions, cites or distinguishes *Mesarosh*. The reason is clear. Those cases do not involve a situation where the witness was totally unworthy of belief.

As noted under Point I, the grand jury acts as a shield against abitrary and unfounded charges. Under those principles, as well as *Mesarosh*, it is inconsequential that there is no intentional government misconduct or actual perjury. It is immaterial that a witness "inadvertently" may have testified falsely or because of psychological problems did not possess the requisite criminal intent to commit actual perjury. Indeed that very claim was rejected by *Mesarosh*. There is no protection of citizens from unfounded, arbitrary charges if a grand jury can return an indictment based on the testimony of one who cannot be believed.

Intending no disrespect, we submit that the Eleventh Circuit deprives citizens of this protection by conjuring up non-existent

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[22] See, e.g., A-5, note 6.

hobgoblins of supposed interference with the judicial process. The court says that under the position urged by petitioners, an accused "could obtain a dismissal of his indictment even if the false testimony addressed a collateral issue and could not have affected the grand jury's decision." It asserts that district courts would have to second-guess grand juries and there would be "a grand jury challenge in every case" or a claim that there was no "effective assistance of counsel." (A-9-10 and n. 14).

The foregoing is specious. The number of times where there is a *Mesarosh* claim, at the trial or grand jury level, is very rare. As stated, neither *Calandra*, *Costello*, nor any other case cited by the Eleventh Circuit involves a finding of *Mesarosh* taint.

Where, as here, the indictment is returned almost exclusively on the basis of testimony of one who, to put it bluntly, is a skillful confirmed liar, the district court should intervene.

3. The Prosecutor's Intentional Falsification Of Facts To The District Court, Which Interferes With Judicial Integrity, Should Not Be Sanctioned.

The district court's supervisory role over the grand jury is well-established . *Costello*, 350 U.S. 359; *Calandra*, 414 U.S. at 346 n. 4 (relied on by the Eleventh Circuit); and *United States v. Chanen*, 549 F.2d 1306 (9th Cir. 1977) (quoted by Judge Spellman at A-37, A-42).

In recognizing this grand jury supervisory role, the Eleventh Circuit also cited *United States v. Hasting*, 461 U.S. 499 at 505 (1983), and set forth the self-evident proposition that courts should exercise this power "to protect the integrity of the federal courts, and to deter illegal conduct by government officials" (A-9). *Chanen*, in discussing the respective roles of the court, the prosecutor and the grand jury, stated the unbending principle that "the prosecutor owes a duty of good faith to the court, the grand jury and the defendant." 549 F.2d at 1313 n. 5.

The record in this case shows without contradiction that on three separate occasions, namely on the petitioners' first (June

1980) omnibus motion, on their second (December 1980) omnibus motion and by reargument motion on the eve of trial, petitioners urged the same salient point. Petitioners asserted there must have been presented to the grand jury endless evidence of copyright infringement and illegal pirating of films, violence, beatings and mafia control, and that as a consequence the grand jury was misled and could not focus on the First Amendment obscenity issues.[23]

On all three occasions the prosecutor, knowing petitioners' fact assertions were true and with intent that the district court rely on his representations, denied the truth. The prosecution — rather than owning up to the improprieties which it sought to downplay in the Eleventh Circuit — repeatedly and deliberately misled the district court into believing no such incidents occurred by responding that the defendants' assertions were "conjecture . . . devoid of any basis."[24] That is a fraud.

The issue on this point is *not* whether the presentation of evidence of mafia control, sale of automatic weapons, etc., tainted the grand jury. It is whether the prosecutor can deceive the district court and make it impossible to render a law ruling on the facts as they exist.

Perhaps Judge Spellman would initially have concluded, had he known the facts from the outset, that this mafia-control evidence was of consequence, or perhaps he would have suggested the prosecutor convene a new grand jury. We will never know. However, one matter is abundantly plain. No judge can make an intelligent law decision where the prosecutor lies about the facts. This is bad faith and illegal conduct.

The record further shows that, in the first and second omnibus motions, petitioners demanded as *Brady* material whether the

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[23] June 15, 1980, 1 5th Supp.R. at pp. 120-122 and D'Apice Law Memo Pt. VI, 6 R. 1324; 1 5th Supp.R. at pp. 255, 277; 11 3rd Supp.R. 18-40.

[24] 15 R. 3293 at 3297 and 3302, 15 R. 3303 at 3316 and 3333 Prosecution Dec. 22 answer; 11 3rd Supp.R. 18-40, trial; see also Feb. 1983 Memo, 1 5th Supp.R. at pp. 497-500.

prosecutor possessed any evidence of "mental instability" concerning any prosecution witness.[25] By the time of the second omnibus motion there had been government consultations with three separate psychiatrists all dealing with Mr. Livingston's "bizarre behavior" and involving "the mental health" of FBI agent Livingston.

The question is *not* whether the "mental instability" evidence regarding Mr. Livingston was, as the government contended in the Eleventh Circuit, merely exculpatory (and therefore need not have been presented to the grand jury) or, as Judge Spellman found, an additional matter about which the grand jury should have been informed because, inter alia, of the prosecutor's "ethical duty" (A-39-40).

There is a more fundamental point. Grand jury proceedings are secret. A prosecutor may not conceal the facts from the district court so that the court cannot intelligently determine whether it should examine the grand jury minutes or exercise any control. The Government's malfeasance in respect to both the mafia evidence taint and Livingston mental problems were only fortuitously discovered when Livingston was caught stealing. The integrity of the judicial system cannot tolerate such conduct, and certainly not in a First Amendment case.[26]

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[25] Pets' June 1980 Omnibus Motion, 1 5th Supp.R. at p. 151; renewed in December 1980, 1 5th Supp.R. at pp. 272-276.

At the time of this demand the *Agurs* rule was in full effect, to wit, the failure to answer a specific demand "is seldom, if ever, excusable." 427 U.S. at 106.

[26] The Eleventh Circuit had the power to entertain our cross-appeal to dismiss with prejudice under the collateral order doctrine of *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541. This indictment should have been dismissed with prejudice because of prosecutorial misconduct. *United States v. Dahlstrum*, 493 F.Supp. 966 (C.D. Cal. 1980) (prosecutorial misconduct in securing indictment through abuse of civil summons authority); *United States v. Roberts*, 481 F.Supp. 1385 (C.D.Cal. 1980) (prosecutorial misconduct before grand jury); *United States v. Fields*, 475 F.Supp. 903 (D.D.C. 1979) (prosecution secured indictment for harassment purposes).

Petitioners and their families have suffered for the past four years untold pain, embarrassment and anguish from this misconceived prosecution which has forced them to contest an illegal indictment; combat unlawful searches and seizures; and try to uncover grievous wrongdoing before the grand jury, which came to light only by chance. If this decision stands, then a defendant in a criminal case in the Eleventh Circuit has no grand jury protection.

CONCLUSION

For the foregoing reasons the petition for certiorari should be granted.

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DATED: New York, New York
February 10, 1986

APPENDIX

APPENDIX A.

SLIP OPINION OF THE U.S. COURT OF APPEALS, ELEVENTH CIRCUIT.

UNITED STATES of America,
Plaintiff-Appellant
Cross-Appellee,

v.

Robert DiBERNARDO, Theodore Rothstein, Defendants-Appellees.

No. 83-5295.

United States Court of Appeals,
Eleventh Circuit.

Nov. 13, 1985.

Appeals from the United States District Court for the Southern District of Florida.

Before TJOFLAT and VANCE, Circuit Judges, and ATKINS*, District Judge.

TJOFLAT, Circuit Judge:

This appeal presents the question of whether, in the absence of an abuse of the grand jury process, a district court may exercise its supervisory power to dismiss an indictment where (1) the grand jury may have heard false testimony or (2) the prosecutor, in advising the grand jury at the end of its investigation, failed to instruct it to disregard prejudicial evidence irrelevant to the offense eventually alleged in the indictment. The district court dismissed the indictment. We reverse.

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* Honorable C. Clyde Atkins, U.S. District Judge for the Southern District of Florida, sitting by designation.

I.

In the summer of 1977, the FBI commenced operation "Miporn," an undercover investigation of the obscenity industry. Posing as pornographers, Special Agents Patrick Livingston and Bruce Ellavsky contacted distributors of pornography throughout the United States ordering sexually explicit magazines, films, and videotapes and arranging to have the merchandise shipped to them in Miami, Florida. After a two-year investigation, the Government presented its case to a grand jury sitting in the Southern District of Florida. Special Agents Livingston and Ellavsky testified extensively about their transactions with the distributors. These witnesses and others who testified before the grand jury described the pornography industry as a tight-knit group, one in which the distributors were well acquainted with one another and were highly suspicious of strangers who attempted to do business with them. The distributors rigidly enforced rules against unauthorized duplication of their videotapes, often resorting to threats and violence. Agent Livingston testified that some of the distributors were members of organized crime families and that the pornography industry was controlled by the "Mafia."

On February 12, 1980 the grand jury returned an eighteen-count indictment (the original indictment) against forty-five defendants, including appellees Robert DiBernardo and Theodore Rothstein. Count one charged the defendants with engaging in a nationwide conspiracy to transport obscene materials in interstate commerce in violation of 18 U.S.C. §§ 371[1] and 1465[2]

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[1] 18 U.S.C. § 371 (1982) provides in pertinent part:

> **§ 371. Conspiracy to commit offense or to defraud United States**
>
> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

[2] 18 U.S.C. § 1465 (1982) provides:

> **§ 1465. Transportation of obscene matters for sale or distribution**
>
> Whoever knowingly transports in interstate or foreign commerce for the purpose of sale or distribution any obscene, lewd, lascivious, or filthy

(Footnote Continued)

(1982). The remaining seventeen counts of the indictment charged small groups of defendants with substantive violations of section 1465. After this indictment was returned, the Government apparently concluded that insufficient admissible evidence existed to establish the conspiracy offense alleged in count one. The Government, therefore, dismissed the indictment, pursuant to Rule 48(a) of the Federal Rules of Criminal Procedure,[3] and represented the case to the grand jury.

On October 15, 1980 the grand jury returned sixteen superseding indictments which effectively divided the single conspiracy alleged in the original indictment into a series of small unrelated conspiracies. In one of these superseding indictments (the instant indictment), the appellees, together with co-defendant Andrew D'Apice, were charged with conspiring to use an express company or common carrier to transport obscene

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book, pamphlet, picture, film, paper, letter, writing, print, silhouette, drawing, figure, image, cast, phonograph recording, electrical transcription or other article capable of producing sound or any other matter of indecent or immoral character, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

The transportation as aforesaid of two or more copies of any publication or two or more of any article of the character described above, or a combined total of five such publications and articles, shall create a presumption that such publications or articles are intended for sale or distribution, but such presumption shall be rebuttable.

When any person is convicted of a violation of this Act, the court in its judgment of conviction may, in addition to the penalty prescribed, order the confiscation and disposal of such items described herin which were found in the possession or under the immediate control of such person at the time of his arrest.

[3] Fed.R.Crim.P. 48(a) provides for dismissal:

(a) **By Attorney for Government.** The Attorney General or the United States attorney may by leave of court file a dismissal of an indictment, information or complaint and the prosecution shall thereupon terminate. Such a dismissal may not be filed during the trial without the consent of the defendant.

materials in interstate commerce, in violation of 18 U.S.C. §§ 371 and 1462* (1982). They were also charged, in six substantive counts, with knowingly using an express company or common carrier to transport obscene materials, in violation of section 1462, and knowingly transporting obscene materials in interstate commerce, in violation of section 1465. The principal factual allegations in the indictment were that D'Apice, as the operator of KED Productions, Inc., sold obscene films and videotapes to the undercover agents and that the appellees, as the true owners of KED, approved all sales of obscene materials and supervised the activities of D'Apice.

After a severance was granted to co-defendant D'Apice, the case proceeded to a jury trial against the appellees. They were convicted on all counts, and, after sentencing, they appealed.

On February 12, 1982, during the pendency of their appeals, the prosecutor wrote a letter to all counsel in the Miporn cases

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* 18 U.S.C. § 1462 (1982) provides:

§ 1462. Importation or transportation of obscene matters

Whoever brings into the United States, or any place subject to the jurisdiction thereof, or knowingly uses any express company or other common carrier, for carriage in interstate or foreign commerce—

> (a) any obscene, lewd, lascivious, or filthy book, pamphlet, picture, motion-picture film, paper, letter, writing, print, or other matter of indecent character; or
> (b) any obscene, lewd, lascivious, or filthy phonograph recording, electrical transcription, or other article or thing capable of producing sound; or
> (c) any drug, medicine, article, or thing designed, adapted, or intended for producing abortion, or for any indecent or immoral use; or any written or printed card, letter, circular, book, pamphlet, advertisement or notice of any kind giving information, directly or indirectly, where, how, or of whom, or by what means any of such mentioned articles, matters, or things may be obtained or made; or

Whoever knowingly takes from such express company or other common carrier any matter or thing the carriage of which is herein made unlawful—

Shall be fined not more than $5,000 or imprisoned not more than five years, or both, for the first such offense and shall be fined not more than $10,000 or imprisoned not more than ten years, or both, for each such offense thereafter.

to inform them of an unfortunate development in the case: Special Agent Livingston, one of the two undercover agents in the Miporn investigation, had been arrested for shoplifting and, at the time of arrest, had identified himself using his Miporn undercover identification documents. The prosecutor also stated that psychiatric examinations indicated that Livingston had difficulty distinguishing between his real identity and his undercover identity. Following receipt of the prosecutor's letter, the appellees moved the district court alternatively to vacate their convictions and dismiss their indictment with prejudice or to grant them a new trial. The defendants in the fifteen companion cases filed similar motions.[5]

The court consolidated these motions for disposition and convened an evidentiary hearing which focused primarily on Agent Livingston's psychiatric problems. Following the hearing and a review of the testimony heard by the grand jury that returned the original and superseding indictments, the district court, in a memorandum opinion, 552 F.Supp. 1315 (S.D.Fla.1982), found that the superseding indictments were significantly "tainted" by two factors: (1) the "subsequent behavior and perjurious propensities" of Special Agent Livingston,[6] *id.* at 1324, and (2) the failure

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[5] At the time of the prosecutor's letter, three of the companion cases had proceeded to trial, resulting in one acquittal and two convictions. The convicted defendants in these cases made motions paralleling the motions made by appellees. The defendants in the twelve superseding indictments that had not proceeded to trial moved the district court for dismissal of their indictments with prejudice.

[6] The district court did not find that Livingston committed perjury in his testimony before the grand jury. The court, however, did make the following finding:

> Although Special Agent Livingston's lies and indiscretions have been limited to the issues framed regarding the shoplifting event, the Court finds from the evidence that he has a great propensity to lie. This Court makes the sad but inevitable conclusion based on the evidence and its personal observation that at present, Patrick J. Livingston would lie when the truth would serve him best.

522 F.Supp. at 1323.

of the prosecutor to instruct the grand jury returning the superseding indictments to "disregard the evidence related to organized crime connections and violent activities of other individuals, and additional irrelevant evidence unrelated to the separate defendants involved in the individual conspiracies." *Id.* at 1325. Based on these findings, the district court, in an exercise of its supervisory power over the administration of criminal justice in the Southern District of Florida, dismissed without prejudice the superseding indictments in the twelve Miporn cases that had not proceeded to trial. The court took no action in the cases that had been tried. The Government immediately moved the court to reconsider its dismissal of the twelve indictments. The court denied the motion in a second memorandum opinion, 561 F.Supp. 783 (S.D.Fla.1983). In that opinion, the court addressed the instant case, which was still on appeal, instructing the Government to show cause why its indictment should not be dismissed. After the Government responded, the district court requested this court to remand the case so that the indictment could be dismissed. We honored the district court's request, and, on June 27, 1983, the district court, following the rationale of its two memorandum opinions, vacated appellees' convictions and dismissed their indictment without prejudice.[7] The Government now appeals from this disposition.[8]

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[7] The court did not rule on appellees' alternative motions for a new trial, but implied that they would be entitled to such relief if its order dismissing the indictment were reversed on appeal. 561 F.Supp. at 786.

[8] This court's jurisdiction is based on the narrow statutory grant of the Criminal Appeals Act, 18 U.S.C. § 3731 (1982), which provides in part:

> In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information or granting a new trial after verdict or judgment, as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.

Appellees desire to cross-appeal the district court's denial of their motion to dismiss the indictment with prejudice. It is well settled that no independent jurisdictional basis exists for appellees' cross-appeal. *See Parr v. United States,*

(Footnote Continued)

II.

The single issue presented by this appeal is whether the dismissal of the indictment against the appellees was a proper exercise of the district court's supervisory power. The district court based its dismissal upon the combined effect of two unrelated factors: (1) the questionable credibility of Special Agent Livingston at the time he testified before the grand jury, and (2) the failure of the prosecutor to instruct the grand jury, when it was considering the superseding indictments, to disregard certain irrelevant prejudicial evidence. We conclude, as did the district court, that neither factor standing alone provided a legally sufficient ground for invoking the district court's supervisory power. Unlike the district court, however, we find that the two factors, being unrelated, could not have had a combined effect which warranted the exercise of such power. This finding follows inexorably from an analysis of the two factors. We turn therefore to a consideration of each factor.

A.

[1] The appellees' supreseding indictment was based in part on the testimony of Agent Livingston. Although the district court did not find that Livingston perjured himself before the grand jury or at trial, it did find evidence which tended to "indicate that Agent Livingston's [psychological] problem in all likelihood existed at the time of the presentation of this case to the grand

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351 U.S. 513, 518, 76 S.Ct. 912, 916, 100 L.Ed. 1377 (1956) (dismissal of an indictment without prejudice is not appealable because it is not a final order); *United States v. Martin*, 682 F.2d 506, 507 (5th Cir.), *cert. denied*, 459 U.S. 1088, 103 S.Ct. 573, 74 L.Ed.2d 934 (1982); *United States v. Arzate*, 545 F.2d 481 (5th Cir.1977); *United States v. Moller Butcher*, 723 F.2d 189, 190 (1st Cir.1983). It is also clear that this court is without pendent jurisdiction over appellees' cross-appeal. *See United States v. MacDonald*, 435 U.S. 850, 857 n. 6, 98 S.Ct. 1547, 1551 n. 6, 56 L.Ed.2d 18 (1978) ("a federal court of appeals is without pendent jurisdiction over otherwise nonappealable claims even though they are joined with a . . . claim over which the appellate court does have interlocutory appellate jurisdiction"); *see also Abney v. United States*, 431 U.S. 651, 662-63, 97 S.Ct. 2034, 2042, 52 L.Ed.2d 651 (1977). This court, therefore, has no jurisdiction to decide appellees' cross-appeal.

jury." 561 F.Supp. at 786. The possibility therefore existed that Livingston may have testified falsely before the grand jury. We hold that, absent proof of government misconduct, the fact that Agent Livingston may have inadvertently given false testimony to the grand jury did not justify the dismissal of the indictment under the court's supervisory power.

In *United States v. Pabian*, we recognized that "[a]lthough the federal judiciary exercises a supervisory role over federal grand juries, that role must be informed by a recognition that dismissal of an indictment . . is an 'extreme sanction which should be infrequently utilized.' " 704 F.2d 1533, 1536 (11th Cir.1983) (quoting *United States v. Owen*, 580 F.2d 365, 367 (9th Cir.1978)). This court has indicated that the possibility that a witness may have given false testimony before the grand jury does not automatically vitiate an indictment based on that testimony; to dismiss an indictment the district court must also find an abuse of the grand jury process such as perjury or government misconduct. *See United States v. Hyder*, 732 F.2d 841, 845 (11th Cir.1984); *United States v. Sullivan*, 578 F.2d 121, 124 (5th Cir.1978)[9] (refusing to "adopt the proposition that, absent perjury or government misconduct, an indictment is flawed simply because it is based on testimony that later may prove questionable"); *see also United States v. Cathey*, 591 F.2d 268, 271-72 (5th Cir.1979) (holding that absent a finding that perjury was committed, there was no basis for dismissing the indictment).

In the instant case there was no indication that the prosecutor intentionally placed false testimony before the grand jury; the district court expressly noted in both opinions that it found no intentional misconduct on his part.[10] Similarly, the court was

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[9] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981) (en banc), this court adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

[10] The district court found no intentional misconduct on the part of the prosecutor in its first opinion. The court stated that "the unusual turn of events referencing Special Agent Livingston may very well have produced an appearance of impropriety on the part of the prosecutor which in fact simply may

(Footnote Continued)

unable to find that Agent Livingston's testimony before the grand jury was perjured.[11] In short, the district court found no abuse of the grand jury process; all that it found was that Agent Livingston might have testified falsely. Appellees contend that this latter finding provided the district court with an adequate basis for invoking its supervisory power. They ask us to disregard the rationale of *Sullivan* and the other cases cited above, which seem to foreclose their contention, arguing that the precise issue before us was not litigated in those cases. Assuming, for sake of argument, that the issue is still open, we reject the proposition appellees advance, that, absent a deliberate abuse of the grand jury process, a district court can dismiss a grand jury indictment in the exercise of its supervisory power.

[2] Federal courts may exercise their supervisory powers to remedy violations of recognized rights, to protect the integrity of the federal courts, and to deter illegal conduct by government officials. *United States v. Hasting*, 461 U.S. 499, 505, 103 S.Ct. 1974, 1978-79, 76 L.Ed.2d 96 (1983). None of these purposes would be furthered by the rule appellees would have us fashion in this case. Under such a rule, the accused would not have to prove that the witness committed perjury or that the government knew that the testimony was false; all the accused would have to show is that the witness' testimony in whole or in part was false. Thus, the accused could obtain a dismissal of his indictment even if the false testimony addressed a collateral issue and could not have affected the grand jury's decision to indict.[12]

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not have existed." 552 F.Supp. 1315, 1328 (S.D.Fla.1982). In its second opinion the district court stated: "There are those who would seek to read this Court's opinion (552 F.Supp. 1315) as a finding of fault by this Court of the actions of the prosecutor before the grand jury. Such is not the case." 561 F.Supp. 783, 786 (S.D.Fla.1983).

[11] Given the psychological problems Livingston was experiencing, it is probable that he could not have possessed the requisite criminal intent to commit perjury.

[12] We recognize that the district court's opinion does not necessarily require the dismissal of an indictment where innocently given false testimony went to a collateral issue and did not unduly prejudice the accused. Even if a *de minimis*

(Footnote Continued)

The implementation of this rule would also present serious practical problems. First, the district courts would have to assess the credibility of grand jury witnesses. This is the grand jury's responsibility, and to allow a district judge to second guess its judgment on credibility "would seriously infringe upon the traditional independence of the grand jury." *United States v. Guillette*, 547 F.2d 743, 753 (2d Cir.1976), *cert. denied*, 434 U.S. 839, 98 S.Ct. 132, 54 L.Ed.2d 102 (1977).[13] Second, the rule would invite a grand jury challenge in every case,[14] creating substantial delays in the administration of the criminal justice system. No good reason has been advanced as to why we should accommodate such challenges under these circumstances. The rule appellees urge is not necessary to protect innocent persons from being convicted on false testimony. At trial, the government has the burden of proving the allegations of the grand jury's indictment beyond a reasonable doubt, and any witness who inadvertently may have testified falsely before the grand jury must withstand cross-examination.

If the precedent we have cited has not rejected appellees' position on this issue, we do so now. We hold that the possibility that Special Agent Livingston testified falsely provided the district court with no ground for the exercise of its supervisory power. Thus, to sustain the dismissal of appellees' indictment we must find some other basis for the use of that power.

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approach is taken, however, a district court would be forced to examine the evidence presented to the grand jury, thus raising the practical problems noted in the text which follows.

[13] For a discussion of the historical role of the grand jury, see *United States v. Sells Eng'g, Inc.*, 463 U.S. 418, 421-25, 103 S.Ct. 3133, 3137-38, 77 L.Ed.2d 743 (1983); *United States v. Calandra*, 414 U.S. 338, 342-45, 94 S.Ct. 613, 617-19, 38 L.Ed.2d 561 (1974); *Costello v. United States*, 350 U.S. 359, 362, 76 S.Ct. 406, 408, 100 L.Ed. 397 (1956).

[14] We make this statement because defense counsel's failure to challenge the indictment would probably result, in the event of a conviction, in the allegation that he did not render his client the effective assistance of counsel required by the sixth amendment.

B.

The second factor assigned by the district court as a basis for dismissing the indictment was the failure of the prosecutor to instruct the grand jury to disregard evidence that supported the allegations of the original indictment but had no bearing on the allegations of the instant indictment. In the court's view, this evidence was not only irrelevant but also prejudicial. A review of the historical functions of the grand jury indicates that, absent an abuse of the grand jury process, the fact that the grand jury during the course of an investigation may have received evidence not relevant to the allegations of the indictment it eventually returns cannot justify the dismissal of such indictment.

[3-6] A grand jury performs two basic functions: (1) the determination of whether there is probable cause to believe a crime has been committed and (2) the protection of citizens against unfounded criminal prosecutions. *Branzburg v. Hayes*, 408 U.S. 665, 686-687, 92 S.Ct. 2646, 2659, 33 L.Ed.2d 626 (1972). To perform these functions, the grand jury has been granted wide powers to inquire into violations of criminal law. Although it may be guided by the prosecutor, the grand jury alone determines the course of any investigation. *United States v. Calandra*, 414 U.S. 338, 343, 94 S.Ct. 613, 617, 38 L.Ed.2d 561 (1974). There is no question, as the district court acknowledged, that the grand jury had the authority to investigate the nationwide pornography industry described in the original indictment. In the course of that investigation it was entirely proper for the grand jury to receive evidence that some distributors in the industry had organized crime affiliations and engaged in violence in conducting their business. Once properly before the grand jury, this evidence would not "taint" the proceeding if, for example, the grand jury had decided not to return the original indictment alleging a nationwide conspiracy but instead elected to return several indictments alleging small local conspiracies. As the Supreme Court stated:

> [T]he scope of [the grand jury's] inquiries is not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation, or by doubts whether any particular individual will be found properly subject to

> an accusation of crime. As had been said before, the identity of the offender, and the precise nature of the offense, if there be one, normally are developed at the conclusion of the grand jury's labors, not at the beginning.

Blair v. United States, 250 U.S. 273, 282, 39 S.Ct. 468, 471, 63 L.Ed. 979 (1919) (citation omitted). We see no reason why the challenged evidence should be treated differently merely because the grand jury in the instant case returned the original indictment prior to returning the superseding indictments.

[7, 8] In sum, if certain evidence is properly before the grand jury, it is of no moment that it is irrelevant to the offense the grand jury eventually alleges in its indictment against the accused. Consequently, standing alone, the presence of such evidence cannot justify the use of the district court's supervisory power. If the court is to exercise its supervisory power, therefore, it must find not only the presence of irrelevant evidence but also an abuse of the grand jury process associated with that evidence, such as inappropriate conduct on the part of the government. In this case, there was no evidence that the prosecutor used the allegedly irrelevant evidence to the appellees' prejudice or otherwise acted in bad faith in presenting their case to the grand jury. In fact, the district court emphasized that the prosecutor acted in good faith. Given the absence of intentional misconduct on the part of the prosecutor, it becomes clear that the district court's conclusion that the prosecutor "abused" the grand jury process was based solely on the notion that an abuse takes place whenever the prosecutor fails to instruct the grand jury to disregard a piece of irrelevant, prejudicial evidence. We decline to treat such failure as an abuse for two reasons.

First, the precedent governing the district court's exercise of its supervisory power requires that the prosecutor's conduct be motivated by bad faith; innocent conduct will not suffice. *United States v. Hyder*, 732 F.2d at 845 ("we decline to exercise our supervisory powers to dismiss the indictment on the ground claimed by appellant of unintentional prosecutorial misconduct in overreaching the grand jury and usurping its independent function");

United States v. Pabian, 704 F.2d at 1539 (conduct did not "approach the flagrant or abusive conduct that has led courts to exercise their supervisory power"); *United States v. Kabbaby*, 672 F.2d 857, 863 (11th Cir.1982) (dismissal of indictment not justified absent abuse of grand jury process); *see also United States v. Griffith*, 756 F.2d 1244 (6th Cir.1985) (dismissal of indictment proper under supervisory power only if there is long-standing prosecutorial misconduct and prejudice to the defendant).

Second, the prosecutorial delay and judicial burden associated with monitoring the prosecutor's duty to deliver limiting instructions would not be justified by the benefit, if any, the accused would derive from a resubmission of his case to the grand jury. The district court's rationale places the prosecutor in a role similar to that of a trial judge ruling on the admissibility of evidence. Unlike the trial judge who presides over an adversary proceeding and can rely on the parties to object to excludable evidence, the prosecutor, under this rationale, must act on his own initiative, instructing the grand jury to disregard any evidence he believes may not be germane to the charge the grand jury is contemplating. The district judge, in turn, acts as an appellate court, ruling on the necessity for a limiting instruction or on the adequacy of an instruction if one was given. In either event, the district court would be required to review the evidence before the grand jury and, in essence, conduct a "minitrial" with respect to each indictment before the case could proceed to trial. The burden such a procedure would impose upon the judiciary would be overwhelming.

The Supreme Court expressed strong opposition to such minitrials in *Costello v. United States*, 350 U.S. 359, 76 S.Ct. 406, 100 L.Ed. 397 (1956). In that case, the Court held that an indictment could not be challenged on the ground that it was based on inadequate or incompetent evidence. Observing that "before trial on the merits a defendant could always insist on a kind of preliminary trial to determine the competency and adequacy of the evidence before the grand jury," *id.* at 363, 76 S.Ct. at 408-09, the Court concluded: "In a trial on the merits, defendants are entitled to a strict observance of all the rules designed to bring

about a fair verdict. Defendants are not entitled, however, to a rule which would result in interminable delay but add nothing to the assurance of a fair trial." *Id.* at 364, 76 S.Ct. at 409. We believe the Court's reasoning applies equally to the issue of limiting instructions.

We also find that the district court's rationale would necessarily require the prosecutor delivering the instruction and the trial court reviewing the instruction to apply Rule 402 of the Federal Rules of Evidence to the grand jury process[15] – an outcome clearly barred by precedent. *See, e.g., United States v. Calandra*, 414 U.S. at 343, 94 S.Ct. at 617 (grand jury's "operation generally is unrestrained by the technicial procedural and evidentiary rules governing the conduct of criminal trials"); *see also Costello v. United States*, 350 U.S. at 364, 76 S.Ct. at 409 (grand jury's inquiry is "unfettered by technical rules").

We accordingly hold, for the reasons stated above, that the prosecutor had no duty to give a limiting instruction to the grand jury in this case. Thus, the prosecutor's failure to instruct the grand jury was not an appropriate ground for the exercise of the district court's supervisory power.

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[15] Implicit in the district court's requirement of a limiting instruction concerning irrelevant evidence is the notion that such evidence improperly prejudices the grand jury and that the criminal justice system cannot accommodate such prejudice. If this is so, it follows that relevant evidence whose probative value is outweighed by its prejudicial effect or propensity to confuse the grand jury on the issues before it should also be excluded. *See* Fed.R.Evid. 403.

In applying Rules 402 and 403 to the grand jury process, prosecutors would inevitably be faced with situations in which a limiting instruction could not remove the prejudicial effect of irrelevant evidence or relevant evidence of minimal probative value. In such situations, the prosecutor would be placed in the dilemma of withholding such evidence and saving the eventual indictment, if he possessed the clairvoyance to foresee the grand jury's charge, or risking the subsequent dismissal of the indictment. The prosecutor's dilemma would be worsened by the fact that, even if he proceeded in an error-free fashion, the grand jury could undo his good work by seizing upon its power to control the investigation and obtaining the evidence in question.

III.

Because we find that neither of the two factors relied on by the district court provided a valid reason for the dismissal of appellees' indictment, we reverse the district court's order dismissing the indictment and remand the case for further proceedings not inconsistent with this opinion.

REVERSED and REMANDED.

APPENDIX A.

JUDGMENT UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT.

No. 83-5295

D.C. Docket No. 80-56

UNITED STATES of America,

Plaintiff-Appellant,
Cross-Appellee,

v.

Robert DiBERNARDO,
Theodore Rothstein,

Defendants-Appellees,
Cross-Appellants.

Appeals from the United States District Court for the Southern District of Florida

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Before TJOFLAT and VANCE, Circuit Judges, and ATKINS*, District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the order of the District Court appealed from, in this cause be and the same is hereby, REVERSED; and that this cause be and the same is hereby, REMANDED to said District Court for further proceedings in accordance with the opinion of this Court.

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* Honorable C. Clyde Atkins, U.S. District Judge for the Southern District of Florida, sitting by designation.

Entered: November 13, 1985
For the Court: Spencer D. Mercer, Clerk

By: _____
Deputy Clerk

ISSUED AS MANDATE: December 5, 1985

APPENDIX B.

DISTRICT COURT OPINION; DECEMBER 20, 1982

UNITED STATES of America, Plaintiff,

v.

Robert "Debe" DiBERNARDO, et al., Defendants.

No. 80-56-Cr-EPS (S1-S16).

United States District Court,
S.D. Florida,
Criminal Division.

Dec. 20, 1982.

MEMORANDUM OPINION AND ORDER DISMISSING INDICTMENTS WITHOUT PREJUDICE

SPELLMAN, District Judge.

THIS CAUSE is before the Court on several motions by various Defendants to dismiss the indictments and motions to adopt and join in the same. Basically, there are two convincing arguments for dismissing the indictments in these cases: tainted grand jury testimony and abuse of the grand jury process.

I. BACKGROUND

In the summer of 1977, the F.B.I. commenced an undercover investigation of major national distributors of sexually explicit films and magazines. Two F.B.I. agents were chosen to pose as pornographers. Special Agent Patrick Livingston played the role of Pat Salamone and Special Agent Bruce Ellavsky posed as Bruce Wakerley.

Together the two undercover agents made contacts throughout the country with national distributors of pornography and arranged to have the merchandise shipped to them in Miami, Florida. The operation was known as "Miporn".

On June 19, 1979, the Government began to present its case to Grand Jury 79-4. For approximately eight months (June 19, 1979 to February 11, 1980), the Grand Jury heard testimony regarding an alleged nationwide conspiracy to knowingly transport in interstate commerce for the purpose of sale and distribution obscene, lewd and lascivious material in violation of Title 18, United States Code, Section 1465.

On February 12, 1980, the Grand Jury returned an indictment charging forty-five (45) Defendants in one count of conspiracy to commit interstate transportation of obscene material. The indictment listed seventy-nine (79) separately numbered paragraphs of alleged overt acts, all in violation of Title 18, United States Code, Section 371, and seventeen (17) substantive counts involving small groups of Defendants, all in violation of Title 18, United States Code, Section 1465 and Section 2.

As part of the conspiracy, it was alleged that the Defendants would facilitate the collection of debts within the obscenity industry and enforce the prohibition against unauthorized duplication of obscene films and motion pictures which are owned, manufactured, and distributed by members of the conspiracy through use of boycots, threats of force and force. To substantiate the above, the Government presented evidence that it assumed would establish a nationwide conspiracy of organized crime individuals who used violence to control the "pornography industry". This evidence included repeated references to mafia control and policies of using violence and extortion. In addition, contemporaneously with the presentation of the evidence relating to this "national" conspiracy to distribute obscene material across state lines, the grand jury heard evidence regarding additional conspiracies to pirate copyrighted films. In fact, the same jury that returned the indictment in this case, *United States v. DiBernardo, et al.*, 80-56-Cr-EPS, involving the alleged national pornography conspiracy, also simultaneously returned the indictments in *United States v. Bernstene, et al.*, Case No. 80-57, and

United States v. Gottesman, et al., Case No. 80-59.

On February 14, 1980, nationwide arrests and searches were conducted. The Defendants were arraigned during the period of March 5th through the 14th, 1980.

The Government dismissed the original indictment. On October 15, 1980, the Government filed superseding indictments, effectively severing the various groups of Defendants into separate conspiracies unrelated to the conspiracies alleged in the other indictments.

At this time, four of the sixteen cases have been tried. The trials have resulted in three convictions, *United States v. DiBernardo, et al.*, 80-56-Cr-EPS (S12), *United States v. Peraino, et al.*, 80-56-Cr-EPS (S3) and *United States v. Bagnell*, 80-56-Cr-EPS (S14) and one acquittal, *United States v. Bernstene*, 80-56-Cr-EPS (S9).

With twelve of the sixteen cases remaining to be tried, a most unexpected turn of events transpired. On January 21, 1982, the prosecutor in charge of the Miporn prosecutions advised this Court that Special Agent Patrick Livingston had been arrested for shoplifting. After discussions with the Court, the prosecutor by letter dated February 12, 1982, advised all Miporn counsel of the Livingston arrest. In this letter, the prosecutor explained that Agent Livingston had been arrested for shoplifting and at that time, identified himself as Pat Salamone. Moreover, the prosecution indicated that Livingston had psychiatric problems which made it difficult for him to distinguish between his real identity and his undercover identity.

Following the above disclosure, several Miporn defense counsel made discovery motions requesting Special Agent Livingston's personnel files, administrative file, and any other file arising out of disciplinary or other proceedings relative to Special Agent Livingston's arrest in November, 1981. Defense counsel also requested the disclosure of all grand jury testimony given by Special Agent Livingston and urged this Court for an evidentiary hearing regarding the entire shoplifting incident.

This Court ordered the Government to produce the requested material for *in camera* inspection. The Court reviewed all files produced and made the determination to disclose all the relevant material including Special Agent Livingston's grand jury testimony. In addition, the Court appointed several psychiatrists to examine Special Agent Livingston to determine whether within reasonable psychiatric certainty a diagnosis can be made as to Special Agent Livingston and how long and to what degree his present condition existed and whether this condition would affect his past, present and future testimony in this case.

To determine what happened, why it happened, and in an effort to discover the truth, this Court granted defense counsel's motion for an evidentiary hearing. For thirteen days, this Court heard testimony from some fourteen witnesses including several psychiatrists who examined Special Agent Livingston, and numerous F.B.I. supervisors and agents who worked with him.[1]

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[1] The evidentiary hearings before this Court took some thirteen days. The Court commenced these proceedings on Tuesday, June 15, 1982 and heard testimony until Friday, June 18, 1982. During this first week, the Court heard testimony from: Dr. William Corwin; Arthur Nehrbass, the former Special Agent in charge of the Miami Office of the F.B.I.; Gordon G. McNeil, Supervisor of all organized crime investigation in the Miami Office for the F.B.I., March 1978 to January 1981; Dr. Paul S. Jarrett; Michael Griffin, Special Agent Supervisor of the F.B.I., Louisville, Kentucky; and James T. Blasingame, Assistant Special Agent in charge of the F.B.I. for the State of Kentucky.

The Court recessed these proceedings on Friday, June 18, 1982 and reconvened on Tuesday, September 14, 1982. The Court heard testimony from September 14, 1982 until Friday, September 17, 1982. During this second week, the Court once again heard from Mr. Blasingame. Additional testimony was taken from James H. Yelvington, who was in the fall of 1981 Special Agent in charge of the F.B.I. for the Division of Louisville, Kentucky; Mr. William Brown, Esq., a close personal friend of Special Agent Livingston; Dr. Dennis Koson; and Fred Arthur Schwartz, the prosecutor in charge of the Midporn prosecutions.

On Thursday, September 23, 1982, the Court began the third week of testimony. On September 23 and September 24, 1982, the Court heard the testimony of Special Agent Patrick Livingston.

The last week of testimony was from Tuesday, September 28, 1982 until Thursday, September 30, 1982. During this last week, the Court heard testimony from Special Agent Patrick Livingston; Special Agent Bruce Edward Ellavsky, who

(Footnote Continued)

The Court even heard testimony from Special Agent Livingston's close friend, Bill Brown, Esq. In fact, as the hearing progressed, it became apparent that a delicate situation was developing with regard to when the prosecutors discovered the Livingston incident. As a result, the Miporn prosecutor, Fred Schwartz, was relieved of his position for purposes of the remainder of the evidentiary hearing, and he and Marcella Cohen were called as witnesses.[2]

At the hearing, a multitude of exhibits were offered and admitted into evidence. These exhibits included depositions of other psychiatrists who examined Special Agent Livingston, F.B.I. reports, memoranda, airtels and other correspondence and reports relevant to the proceedings. On September 30, 1982, this Court concluded the evidentiary hearings.

II. ANALYSIS

The Court now has pending before it: Motions For New Trials, Motions to Dismiss the Indictments, Motion to Exclude the Testimony of Special Agent Livingston, and Motion for an Evidentiary Hearing and For Discovery on the Issue of Selective Prosecution. Counsel for the defense and prosecution have extensively briefed the legal and factual issues relative to their

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was Special Agent Livingston's partner in the Miporn investigations; Gordon G. McNeil was recalled; Special Agent Gary Warren Aldrich, who worked with Special Agent Livingston on the Miporn investigation; and Marcella Sue Cohen, Attorney for the Miami Strike Force assigned to prosecute the Miporn cases.

[2] Defendants moved to have Special Attorney, Fred A. Schwartz, removed as Federal Prosecutor for purposes of the Livingston Evidentiary Hearing. The Court found that Mr. Schwartz was more properly a witness than an advocate in this matter. Since he had an opportunity to observe Special Agent Livingston throughout the entire period of time relevant to the hearing and because his testimony was essential to some of the issues before the Court such as the timeliness of *Brady* disclosures and the like, Mr. Schwartz was removed as prosecutor. *See* Ethical Consideration 5-9; Disciplinary Rule 5-102(B) and *United States v. Treadway*, 445 F.Supp. 959 (N.D.Texas, 1978).

The Court found it unnecessary to exclude Mr. Schwartz from the hearing. In this regard, the Court found that Mr. Schwartz should not be treated any differently than a case agent. Federal Rule of Evidence 615(2).

respective Motions. Moreover on November 12, 1982, this Court heard oral argument with regard to all pending Motions involving Special Agent Livingston. Therefore, at this time, the Court finds itself in an excellent posture to rule on the pending Motions.

After closely examining all the evidence, this Court concludes that Special Agent Livingston has a serious credibility problem. Although this Court does not comment on whether former testimony given by Special Agent Livingston was true or false, it does clearly find that his testimony before the grand jury is tainted. Without attempting to catalog all the varied lies and indiscretions on the part of Special Agent Livingston, the Court does find the following facts as supportive of its opinion.

A. TAINTED GRAND JURY TESTIMONY

On or about March 17, 1980, SAC Nehrbass, who was the F.B.I. Agent in charge of the Miami Office at the time, contacted a psychiatrist, Dr. Alfredo Balasini, expressing concern for the mental health of Special Agent Livingston. On Wednesday, March 26, 1980, SAC Nehrbass wrote a letter to Dr. Balasini. In pertinent part the letter states:

> The Agent that I am concerned about is Patrick J. Livingston, who has exhibited indications of abnormal intensity respecting his continuing role in a particular investigation into organized crime involvement in pornography in the United States. He fulfilled an undercover assignment for two and a half years posing as a pornographer. The perception of other individuals who were involved in this investigation is that *Livingston now feels he is the only individual who can bring this case to a successful conclusion, that it is essential he coordinate everyone's efforts, and that he feels that other members of the team are conspiring to 'take the case away from him.'* Livingston played a most convincing role during these two and a half years. He demonstrated that he has the ability to gain people's confidence and, of course, for two and a half years has

> practiced a huge deception. This background and apprent ability may carry over into his 'normal' life in that he is probably capable of deceiving as to his true present personality, at least for short periods of time. (Emphasis added).

The Court finds the above observation particularly significant when one considers that just one month prior to the writing of this letter Special Agent Livingston was testifying before the grand jury that returned the Miporn indictments.

On May 18, 1980, Dr. Balasini wrote a letter to SAC Nehrbass containing a diagnosis and a prognosis. In this letter, Dr. Balasini states that "whatever symptoms Mr. Livingston displayed prior to my interview with him were no longer present at the time of examination" and that the diagnosis was adjustment reaction to adult life and the prognosis was good with no treatment necessary at this point. However, Special Agent Livingston in a written statement to his superiors in the F.B.I. admits that he told Dr. Balasini only what he wanted to hear. (Special Agent Livingston's January 27, 1982 letter in response to charges by Oliver B. Revell at page 7).

Sometime later in 1980, William J. Brown, Esq., who is a close personal friend of Special Agent Livingston, contacted Dr. Carl H. Marlowe. Mr. Brown expressed a concern regarding Special Agent Livingston's deteriorating personality. Dr. Marlowe referred Livingston to Dr. Gurri.

Dr. Gurri's diagnosis of Agent Livingston was "acute adult situational reaction." (Deposition of Joseph N. Gurri dated May 6, 1982 at 48).[3] According to Dr. Gurri, Special Agent Livingston's main concerns involved some marital difficulties and role adjustment after prolonged undercover work. *Id.* at 35 and 98.

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[3] In an Order dated April 14, 1982, this Court granted defense counsel's motion to take the depositions of Doctors Richards, Gurri, Riddick and Balasini, all of whom examined Special Agent Livingston during the relative period of time in question here.

In September of 1980 pursuant to his transfer from Miami, Special Agent Livingston reported to the Louisville, Kentucky office for duty. On November 10, 1981, Special Agent Livingston went to Bacon's Department store in St. Matthews, Kentucky. He drove there in his F.B.I. vehicle and left his then three year old son sleeping in the car. Sometime after entering the store, he put several items of clothing all his size in a Bacon's department store bag. As Special Agent Livingston prepared to leave the store carrying the bag, he was stopped by a security person and accused of attempting to shoplift. Special Agent Livingston immediately denied any wrongdoing and identified himself as Pat Salamone. He also produced a Kentucky drivers license in the name of Pat Salamone.

Special Agent Livingston was then arrested for shoplifting and transported to the police station. Sometime after arriving at the police station, Special Agent Livingston made a call to his F.B.I. Supervisor Michael Griffin. Special Agent Livingston explained to Griffin what had transpired. Griffin told him to admit his true identity and Livingston did. Special Agent Livingston was released on his own recognizance. On November 11, 1981, Supervisor Griffin required Livingston to surrender all his undercover identification and his weapon.[4]

On November 17, 1981, Special Agent Livingston made a sworn statement to SAC Yelvington, who in the Fall of 1981 was Special

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[4] The shoplifting charges against Special Agent Livingston were ultimately dismissed. At one time, Special Agent Livingston had petitioned "the Commonwealth Attorney's Office for consideration under the Diversion Program wherein community service for a six-month period would be the alternative to entering a guilty plea." (F.B.I. airtel from SAC, Louisville to Director, F.B.I. dated February 26, 1982). However, after changing attorneys, Special Agent Livingston rejected the Commonwealth Attorney's Diversion Program.

Bacon's Department store initially agreed to a reduction of its charges from a felony to a misdemeanor. However, later Bacon's agreed to dismiss the charges in exchange for a signed waiver from Special Agent Livingston not to sue for false arrest. *Id.*

Agent in Charge of the F.B.I. for the Division of Louisville, Kentucky. In this statement, Special Agent Livingston lied about the shoplifting event. He stated the bag was not in his possession and he did not know what the security person was talking about. He said he was falsely accused and that "[a]t no time did I have a bag in my possession while at Bacon's Department store, nor did I take any clothing for my own use." He also stated that he identified himself as Pat Salamone "because I thought this was the only identification I had on me."

At a later date in response to a letter from Oliver Revell of the F.B.I. stating that the Bureau was considering administrative action, Agent Livingston restates the factual history of the shoplifting incident. In this letter of January 27, 1982, Agent Livingston admitted that he picked up the items of clothing and put them in the bag. With reference to being confronted by the woman employed at Bacon's, Livingston explains that he denied association with the bag because he knew the situation looked bad. He also admitted that on November 26, 1981 he told Supervisor Griffin that he put the items of clothing in a Bacon's bag and was stopped by a Bacon's security employee with the bag in his possession.

At the evidentiary hearing, several F.B.I. Agents related the shoplifting incident as Livingston told them. A.S.A.C. Blasingame, who is the Assistant Special Agent in Charge of the F.B.I. for the State of Kentucky, noted in a November 13, 1981 memorandum that Livingston reported to Griffin "that when arrested he told the security officer at Bacon's department store that he was Pat Salamone as that was the only identification he had with him." The truth was that Agent Livingston had his real drivers license in his possession.

With regard to the same incident, Supervisor Michael Griffin in his internal F.B.I. memorandum transcribed December 10, 1981 relates his discussion with Special Agent Livingston on November 26, 1981. Griffin relates "Livingston stated he identified himself as Patrick Salamone in this incident because he knew that Pat Livingston would not steal these items as he . . . (Livingston) didn't need the items but that Patrick Salamone would do something like that."

It appears to the Court that every time Special Agent Livingston relates the shoplifting incident he changes his story. At his deposition, Dr. Richards stated that Special Agent Livingston had admitted shoplifting but would not admit he did it intentionally. (Deposition of Dr. Richards, dated May 5, 1982, at 44 and 45). Dr. Jarrett, one of the Court-appointed psychiatrists, reported that Livingston told him the only identification he had with him while in the department store was the drivers license of Patrick Salamone. Dr. Corwin's rendition of the facts of the shoplifting incident revealed that Livingston repeatedly denied the charges, and that while Livingston admitted having the clothing in his possession he had planned to pay for them before he left the store. Livingston also told Dr. Corwin that his real drivers license was in the car. Dr. Stillman recounts the facts of the shoplifting incident as related to him by Livingston making it clear that Livingston conveyed the impression that the accusations were baseless and simply a mistake. Dr. Sadoff notes that Livingston told him that when he was stopped in the store he said it was all a mistake and showed the security person his Salamone identification. Livingston admitted to Dr. Sadoff that he knew that he had his real drivers license in his wallet but it was not as accessible as the Salamone license.[5]

Agent Livingston testified before this Court. He stated that in his January 27, 1982 letter to Revell he intended to admit his intent to shoplift. However, as noted above, months after the shoplifting incident when questioned by mental health professionals he gives conflicting accounts of the incident. In fact, while testifying before this Court, Agent Livingston first stated that he did not know whether he intended to steal or not, then he

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[5] On April 12, 1982, Dr. Sadoff examined Special Agent Livingston at the request of Oliver B. Revell, Assistant Director, Administrative Division, F.B.I. He sent a report to Mr. Revell dated April 19, 1982 in which he characterizes Special Agent Livingston's shoplifting incident as "a cry for help and a way of calling attention to his difficulties." Dr. Sadoff's report, dated April 19, 1982 at 7.

admitted that he intended to shoplift and still later stated he was confused and was not sure what he was doing.[6]

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[6] For instance, when asked whether he was attempting to perpetrate a deceit by giving the security person the Salamone identification the following exchange took place:

> Q. And you knew that you were deceiving them or attempting to deceive them as to your identity, did you not?
>
> A. I knew I was Livingston, and I knew I was giving the driver's license in the name of Salamone.
>
> Q. You knew you were attempting to perpetrate a deceit?
>
> A. I don't – they asked for a license, I pulled my wallet out and gave them a license. I did not think that, no, I was going to do this, or I was going to do that –
>
> The Court: Can you answer the question? Were you attempting to deceive them or not
>
> *The Witness: I don't know if I was attempting to deceive them or not.* I mean, I gave them the Salamone license, yes. (Tr.at 1860, emphasis added).

Under more insistent questioning, Livingston changed his testimony:

> Q. So, let's just stay back a little bit and I will ask you again, you know you were deceiving them, didn't you?
>
> A. *As soon as I gave them the license, I knew I was deceiving.*
>
> Q. As you were giving them the license, *it was your intent to deceive, was it not?*
>
> A. *I guess.* (Tr. at 1861, emphasis added).

The questioning continued and Special Agent Livingston had difficulty answering the questions directly. The Court then questioned Special Agent Livingston:

(Footnote Continued)

Also significant in the Court's conclusion that Special Agent Livingston's testimony has tainted these proceedings is the evaluation of the psychiatrists who examined him. For instance, Dr. Corwin was asked a hypothetical question in which Livingston was called to testify as an undercover agent for the F B.I. where the F.B.I. wanted a conviction and where Livingston's testimony would be crucial in obtaining that conviction. Dr. Corwin stated that Livingston would be more likely to give testimony favorable to himself and the F.B.I. as opposed to telling the truth.

The Court: The question is, at the time you were asked for the driver's license, did you not make a conscious choice to bring out the Salamone driver's license rather than the Kentucky Livingston driver's license? It's a simple question, did you make a conscious decision to take one as against the other?

The Witness: Well, you know, I guess I did. I pulled my wallet, the Salamone license was on top, I pulled it out and gave it to him—

The Court: Patrick, Patrick, nobody knows whether you did or not, except yourself. Now you can't say I guess I did. You either did consciously or did not, and the question is one that needs to be answered.

Did you consciously take out the Salamone driver's license as against the Livingston driver's license?

The Witness: Yes.

The Court: Okay. (Tr. at 1868-1869).

When asked whether in his letter to Revell he intended to acknowledge his intent to shoplift, Special Agent Livingston responded:

A. I think I acknowledge the event that occurred out there—

The Court: The question was, did you intend to?

The Witness: Yes. (Tr. at 1957).

He was then asked:

A. Did you acknowledge an intent to steal?

A. Yes. (Tr. at 1957-1958).

The Court then questioned Dr. Corwin:

> THE COURT: Based on reasonable psychiatric probability, would he have a tendency to lie on occasion, manifesting the diagnosis that you made strictly where that testimony might be on a very sensitive area which he is called upon to address himself?
>
> THE WITNESS: Yes, I think he could.
>
> THE COURT: Based on psychiatric probability?
>
> THE WITNESS: Yes, it is my opinion that he could. (Transcript of Hearing [Tr.], 6/15/82 at 219.)

Dr. Koson, who was an independent psychiatrist called by the defense and who examined Special Agent Livingston, gave his professional opinion with regard to Livingston's credibility:

> Q. Doctor, let me ask you, finally: Have you an opinion, based upon reasonable psychiatric probability, whether Mr. Livingston would have, as you put it, a propensity to lie or penchant or tendency to lie on an occasion where that testimony might be in a very sensitive area and where it might serve Mr. Livingston's own personal needs?
>
> A. Yes.
>
> Q. What is that opinion?
>
> A. In my opinion, he has a propensity or a tendency to lie when he needs to, in those situations where it might meet his needs. And he is good at it, has a propensity for doing that, and he has demonstrated that, and it depends on the situation and the conditions in his own needs and the time. (Tr. at 1508).

Dr. Koson also noted it would be "very difficult" for a jury to determine if Livingston was telling the truth. In his opinion, because of Livingston's tremendous skill and capability of deception he presents a much more formidable liar than the average

witness. Moreover, Special Agent Yelvington reported that he could not in good conscience ask another agent to work with Special Agent Livingston. In fact, testifying before this Court under oath, Yelvington, Livingston's direct superior in Kentucky, stated that without independent knowledge of the facts, he would not believe Livingston. (Tr. at 1049).

Although Special Agent Livingston's lies and indiscretions have been limited to the issues framed regarding the shoplifting event, the Court finds from the evidence that he has a great propensity to lie. This Court makes the sad but inevitable conclusion based on the evidence and its personal observation that at present, Patrick J. Livingston would lie when the truth would serve him best. Whether this condition existed but laid dormant or whether it is attributable to wounds suffered while playing the undercover role for two and a half years is immaterial to this Court's determination.[7]

In *Mesarosh v. United States,* 352 U.S. 1, 77 S.Ct. 1, 1 L.Ed.2d 1 (1956), the United States Supreme Court found that "[t]he dignity of the United States Government will not permit the conviction of any person on tainted testimony." *Id.* at 9, 77 S.Ct. at 5. The Court in *Mesarosh* concluded that since the conviction was tainted, there could be no just result than to accord petitioners a new trial.

The defendant in *Mesarosh* was convicted for conspiring to violate the Smith Act by advocating the violent overthrow of the government. The United States Supreme Court had already granted *certiorari* when the Solicitor General moved for remand to the trial court for further proceedings. In his motion, the

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[7] The court is aware that although the decision is not final, the F.B.I. has discharged Special Agent Livingston for having given perjured statements to the agency relating to the shoplifting incident. Although the Court does not take a position one way or the other with regard to Special Agent Livingston's retention by the F.B.I., it does believe that due consideration should be given to the medical testimony in determining whether he is entitled to disability.

Solicitor General called to the Court's attention false testimony given in subsequent proceedings by Mazzei, who was a key witness for the Government in *Mesarosh*.

Although the Solicitor General believed the actual testimony given by Mazzei at the *Mesarosh* trial was truthful, the subsequent lies taken cumulatively led the Government to believe that the issue of Mazzei's truthfulness should "be determined by the District Court after a hearing." *Id.* at 4, 77 S.Ct. at 2.

The post-trial testimony of Mazzei revealed that he lied in a variety of different contexts. Some of his discredited post-trial testimony dealt with the Communist conspiracy issue. Other false testimony by Mazzei involved his pleading guilty to adultery and bastardy in a Pennsylvania state court and then a year later petitioning to set aside the guilty plea, claiming he had been induced to enter the plea by the F.B.I. The F.B.I. denied any such thing. *Id.* at 5, 77 S.Ct. at 3. Additionally, Mazzei contended that the F.B.I. had arranged to get him into the Army as part of an undercover assignment and had sometimes paid him $1,000 a month for expenses. The F.B.I. denied having anything to do with his career in the Army and claimed it paid him a total of $172.05 for expenses over a ten-year period. *Id.* at 7, 77 S.Ct. at 4.

The government indicated that the untrue subsequent statements may have been caused by psychiatric problems which arose subsequent to trial. Without remanding the case for an evidentiary hearing on the matter the United States Supreme Court ordered a new trial because the conviction was tainted. The Court noted:

> The district judge is not the proper agency to determine that there was sufficient evidence at the trial, other than that given by Mazzei, to sustain a conviction of any of the petitioners. *Only the jury can determine what it would do on a different body of evidence, and the jury can no longer act in this case.* (Emphasis added).

Id. at 12, 77 S.Ct. at 7.

The Court found that Mazzei's testimony polluted the waters of justice. In the words of the Court:

> *The untainted administration of justice is certainly one of the most cherished aspects of our institutions.* Its observance is one of our proudest boasts. This Court is charged with supervisory functions in relation to proceedings in the federal courts. *See McNabb v. United States*, 318 U.S. 332 [63 S.Ct. 608, 87 L.Ed. 819]. Therefore, fastidious regard for the honor of the administration of justice requires the Court to make certain that the doing of justice be made so manifest that only irrational or perverse claims of its disregard can be asserted. *Communist Party v. Subversive Activities Control Board*, 351 U.S. 115, 124 [76 S.Ct. 663, 667, 100 L.Ed. 1003]. (Emphasis supplied).

Applying the *Mesarosh* reasoning in *Williams v. United States*, 500 F.2d 105 (9th Cir.1974), the Court held that a defendant who had filed a petition for habeas corpus was entitled to a new trial by reason of tainted material testimony of a government agent. In *Williams*, the defendant was convicted for selling and facilitating the sale of heroin. The conviction was affirmed. Williams then filed a habeas corpus pursuant to 28 U.S.C. § 2255 and the District Court denied it. Williams appealed and the Ninth Circuit reversed.

[1] In *Williams*, a narcotics agent who testified against Williams at his trial later pled guilty to conspiracy to deprive a person of his civil rights. The fact that this government agent gave material testimony against Williams and then subsequently was charged with perjury and convicted of another crime compelled the Court to grant Williams a new trial. The other investigation was similar in nature and contemporaneous with Williams' case. A conviction cannot stand based substantially upon tainted evidence. *Id.* at 108.

[2]This Court finds the reasoning in *Mesarosh* and *Williams* applicable to the case at hand. Special Agent Livingston's subsequent behavior and perjurious propensities have created a significant taint on the administration of justice. In the Court's opinion, the *Mesarosh* reasoning is just as compelling with regard

to testimony before a grand jury as it is before a petit jury. Therefore, the only way of being absolutely sure that the taint is removed is to dismiss the instant indictments and allow the government to go before a new grand jury and present the evidence with full disclosure of all the facts.

The Court is mindful that dismissal of a grand jury indictment is a drastic remedy and courts are very reluctant to dismiss indictments. However, pursuant to the Court's supervisory power and in the interest of justice, this Court believes that there exists ample factual and legal basis upon which to conclude that this indictment constitutes a serious intrusion into the judiciary's interest in the fair administration of the criminal justice system.[8]

The difficulties and complexities of this case do not end with Special Agent Livingston's situation. If presented only with the Livingston situaton, this Court might be inclined to fashion some alternative remedy. This is so especially in light of the precedential ramifications a decision such as this might have. However, the facts in this case present a more serious and compelling situation than where one is merely confronted with subsequent false testimony of a key government witness. There is, in addition, a serious question with regard to abuse of grand jury process.

B. ABUSE OF THE GRAND JURY PROCESS

On December 5, 1980, counsel for the Miporn defendants made a motion to inspect grand jury minutes and to dismiss the indictment because of improper presentation of evidence to the grand jury or abuse of the grand jury process. This Court denied the motion. The denial was based on the fact that the defense attorneys' assertions were based on deductions and extrapolations of the off-the-record comments made by the prosecuting attorneys.

After receiving Special Agent Livingston's grand jury testimony, the defendants reasserted their previous motion. The charge of

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[8] The Court's supervisory power is discussed at pages 1328-1329 *infra*.

grand jury abuse is based on grand jury taint. Specifically, defendants complain that evidence of organized crime, violence, illegal duping and pirating of copyrighted material, references to loan sharking, trafficking in drugs and automatic weapons was presented to the grand jury in the first indictment. Defendants claim that this evidence was fatally prejudicial and unrelated to the alleged violations of Title 18, United States Code, Section 1465. Moreover, the defendants assert that the presentation of such evidence made it near impossible for the grand jurors to focus on the delicate first amendment questions at issue.

The defendants contend that once having been tainted the grand jury could not make the necessary separation of evidence as required. According to the defendants, when the prosecution went before the grand jury the second time, the grand jury should have been instructed that they were no longer to view all prior testimony as connected but must focus on individual culpability.

The Court ordered all the grand jury testimony produced for *in camera* inspection. Having reviewed all the testimony heard by the grand jury, the Court finds a serious problem exists.[9] The prosecutor at no time instructed the grand jury returning the superseding indictments to disregard the evidence related to the organized crime connections and violent activities of other individuals, and additional irrelevant evidence unrelated to the

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[9] Upon reviewing the grand jury transcripts the Court found numerous references to "mafia" and "organized crime". The testimony before the grand jury contained continual references to a nationwide conspiracy linked to organized crime (Tr. 8/21/79 at 43-44). The Court also finds repeated references to the fact that the "Miporn" defendants used force and violence to control and police the pornography industry. (Tr. 7/19/79 at 20-21 and at 52). Moreover, testimony given before the grand jury and not disclosed to defense counsel revealed that an individual testified that the interstate transportation of obscenity is "mafia" controlled, and policed by violence. (Tr. 11/28/79 at 12 and 22).

The following is illustrative of the type of irrelevant, prejudicial testimony which tainted the proceedings:

Q. What squad of the Miami office of the F.B.I. are you assigned to?

(Footnote Continued)

separate defendants involved in the individual conspiracies. In this regard, the Court finds the grand jury was originally tainted by the presentation of highly prejudicial evidence totally unrelated to the individual conspiracies charged and that the grand jury process was again abused at the time of the superseding indictments. Had the prosecution sought and received indictments with regard to the Racketeer Influenced Corrupt Organization Act (RICO), Title 18, United States Code § 1961 *et seq.* the Court would be more sympathetic; however, no such indictment was returned. Moreover, when the situation involved a national conspiracy the presentation of certain seemingly unrelated and prejudicial testimony may arguably have been proper, but when viewed in light of the superseding indictments which charged only small conspiracies with regard to a few films or other items, there is a serious question as to improper presentation of evidence to the grand jury and abuse of the grand jury process.

Along the same lines, the defendants claim that the indictment should be dismissed because misconduct by the prosecutor usurped the role of the grand jury. According to defense counsel, the Miporn prosecutor had knowledge of Special Agent Livingston's problems before the second grand jury convened. With regard to this, counsel for the defense direct the Court's attention to the testimony of Arthur Nehrbass, the Special Agent in Charge of the Miami Office of the F.B.I. from April 1979 until late December 1981, where he states that the prosecutor knew of Special Agent Livingston's problems shortly after the return of the first indictment in February of 1980. (Tr. at 284-5). In addition, the Court's attention was directed to the testimony of

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A. The Organized Crime Squad.

Q. Are you assigned to that particular squad for any reason?

A. The reason is, the F.B.I. and I take it the Justice Department too, has decided that the interstate transportation of obscene material is, at least in large measure, controlled by organized crime figures, which it is. (Tr. 11/28/79 at 12).

Special Agent Gordon G. McNeil, where he indicates that the prosecutor was told about Livingston's referral to Dr. Balasini before the second indictment. (Tr. at 576-7).

Based upon the above, the defendants claim it is conclusively established that the prosecution knew of Special Agent Livingston's problems prior to seeking the second indictment. Since Special Agent Livingston did not testify before the second grand jury but they were asked to consider his prior testimony, the defendants claim the prosecution had an ethical duty to inform the grand jury of evidence which undercut Special Agent Livingston's credibility. Therefore, the defendants contend that the grand jury was overreached and the prosecutor's misconduct usurped the grand jury's role.

[3] The historic role of the grand jury is to shield the innocent against arbitrary and unfounded charges and to determine if there is probable cause to believe a crime has been committed. *United States v. Calandra*, 414 U.S. 338, 342-343, 94 S.Ct. 613, 617, 38 L.Ed.2d 561 (1974); *United States v. Dionisio*, 410 U.S. 1, 16-17, 93 S.Ct. 764, 772, 35 L.Ed.2d 67; *Ealy v. Littlejohn*, 569 F.2d 219, 226 (5th Cir.1978).

In *Calandra* the Court stated:

> The institution of the grand jury is deeply rooted in Anglo-American history. In England, the grand jury served for centuries both as a body of accusers sworn to discover and present for trial persons suspected of criminal wrongdoing and as a protector of citizens against arbitrary and oppressive governmental action . . .

414 U.S. at 342-343, 94 S.Ct. at 617. Moreover, and especially with regard to an obscenity case such as the one before this Court where there are delicate first amendment issues, the following language from *Wood v. Georgia*, 370 U.S. 375, 390, 82 S.Ct. 1364, 1373, 8 L.Ed.2d 569 (1962) is enlightening:

> (It is) . . . important that freedom of communication be kept open and that the real issues not become obscured to the

> grand jury . . . . The necessity to society of an independent and informed grand jury becomes readily apparent in the context of the present case.

Id. at 390, 82 S.Ct. at 1373.[10]

[4] District Courts have inherent authority to dismiss indictments when the prosecutor has engaged in egregious misconduct or where the totality of the circumstances makes it clear that the grand jury process has been abused or subverted. In *United States v. Chanen*, 549 F.2d 1306 (9th Cir.1977), the Ninth Circuit Court of Appeals noted that:

> On occasion, and in widely-varying factual contexts, federal courts have dismissed indictments because of the way in which the prosecution sought and secured the charges from the grand jury . . . . These dismissals have been based either on constitutional grounds or on the court's inherent supervisory powers . . . . Whatever the basis of the dismissal, however, the courts' goal has been the same, 'to protect the integrity of the judicial process,' . . . particularly the functions of the grand jury, from unfair or improper prosecutorial conduct.

Id. at 1309.[11]

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[10] In *Wood*, a county judge in the midst of a local political campaign issued a charge to the grand jury giving instructions to investigate accusations of alleged bloc voting by negroes and other rumors that political candidates used money to obtain the negro vote. A sheriff, who was a candidate for reelection, issued a press statement criticizing the judge and urging the citizens to take notice when their judges threatened and intimidate voters under the pretense of law enforcement.

The sheriff was charged with contempt and obstruction of the grand jury. The trial court found the sheriff guilty. The case went to the United States Supreme Court where it was held that the record does not support a finding that the sheriff's statements presented a clear and present danger to the administration of justice and that his conviction violated his right to freedom of speech pursuant to the first and fourteenth amendments. *Id.* at 395, 82 S.Ct. at 1375.

[11] In *Chanen*, a government agent read the grand jury transcripts of sworn testimony from a previous grand jury proceeding. The F.B.I. agent presented

(Footnote Continued)

In *United States v. Samango*, 607 F.2d 877 (9th Cir.1979), the court affirmed a district court's dismissal of a superseding indictment. The court held that the manner in which the prosecutor obtained the indictment represented a serious threat to the integrity of the judicial process. Therefore, the court of appeals viewed the district court's dismissal of the indictment as "a proper exercise of its supervisory power." *Id.* at 885.

In *Samango*, one Dionisia Ferrer was indicted for drug smuggling. As part of a continuing investigation, Samango appeared before a grand jury that did not return an indictment. At the outset of Samango's first appearance, the prosecutor commented about his dissatisfaction with Samango's performance under a nonprosecution agreement. During the questioning of Samango, the prosecutor insinuated he was lying, they bickered at length and finally Samango asserted his Fifth Amendment privilege. *Id.* at 879.

A second grand jury reviewed transcripts of Samango's testimony before the first grand jury along with transcripts from related grand jury proceedings and received live testimony from other witnesses. The live testimony was basically monosyllabic affirmances or denials of the prosecutor's statements. The court characterized the indictment returned by this grand jury as an embarrassment.

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documentary evidence and responded to questions from jurors. The prosecutor advised the grand jury that witnesses had previously made statements inconsistent with their grand jury testimony and that the transcripts contained confessions of such witnesses.

The district court reasoned that since the government presented its case live before the first grand jury any subsequent grand jury should have the same opportunity to hear it live. Therefore, the district court dismissed the indictment. *Id.* at 1309.

The court of appeals reversed. The court held that the procedure used was not fundamentally unfair. The district court by dismissing the indictment exceeded its authority. According to the court of appeals, the district court did not have a clear basis in fact and law for encroaching on the prerogatives of the prosecutor. That is, what evidence to present to the grand jury and how to present it. *Id.* 1313.

While a hearing on a motion to dismiss the indictment was pending the prosecutor convened a third grand jury. He left an accumulated 1,000 pages of transcripts and a prepared superseding indictment with this grand jury. Also, testimony of one witness was presented. This testimony basically summarized the D.E.A.'s investigation. However, the witness was not involved with much of the investigation about which he testified. This third grand jury returned an identical indictment to the original. *Id.*

The Court found that the "cumulative effect of the above errors and indiscretions, none of which alone might have been enough to tip the scales, operated to the defendant's prejudice by producing a biased grand jury." Therefore, acknowledging that under its supervisory power a court may dismiss an indictment as a prophylactic tool for discouraging governmental impropriety, the court affirmed the district court's supervisory act of dismissing the indictment. *Id.* at 884.

Although this case lacks the scienter so prevalent in other cases, this Court finds that the reasons for dismissal are even more compelling than those in *Samango.* First there is the taint on the entire proceedings as a result of Special Agent Livingston's numerous and varied lies and indiscretions. Second, there is the problem of the extraneous and irrelevant evidence presented to the grand jury which in this Court's opinion may very well have interfered with their ability to concentrate on the delicate obscenity issues before them. Finally, there is the question of whether the prosecutor knew of Special Agent Livingston's problems before the second grand jury, and whether or to what extent Special Agent Livingston was experiencing psychological problems while testifying before the grand jury in the late part of 1979 and early part of 1980 as evidenced by SAC Nehrbass' letter to Balasini in March of 1980. Certainly the cumulative effect of the above operated to the defendants' prejudice by producing a tainted if not biased grand jury.

[5, 6] The prosecution has a good faith duty to the Court, the grand jury and the defendant. *United States v. Basurto,* 497 F.2d 781, 786 (9th Cir.1974). In this regard, if the prosecutor has in

his possession evidence which would cast doubt on the credibility of a witness before the grand jury, he has an ethical duty to disclose it. *See* 8 Moore's Federal Practice paragraph 6.03[2], at 6-61 (2d ed. 1978). However, in this case, the Court finds that the unusual turn of events referencing Special Agent Livingston may very well have produced an appearance of impropriety on the part of the prosecutor which in fact simply may not have existed. Although the Court finds no intentional misconduct on the part of the prosecution, the facts in this case establish that a false impression may very well have been created by the presentation of irrelevant prejudicial evidence to the grand jury and that in light of Special Agent Livingston's difficulties these proceedings have been tainted.

III. SUPERVISORY POWER

Pursuant to its supervisory power over the criminal justice system, this Court hereby dismisses the indictments in *United States v. DiBernardo, et al.*, Case No. 80-56-Cr-EPS (S1-S16). In the Court's opinion, the dismissal of the indictments in these cases is the legally correct remedy and is the remedy most consistent with fundamental fairness and due process.

[7] With regard to the government, it may appeal this Court's ruling dismissing the indictments, or it may seek new indictments based on those facts which are alleged in the superseding indictments. The question is whether a new grand jury fully advised of all the surrounding circumstances and unaffected by irrelevant and unrelated testimony would return the indictments sought by the Government. In the Court's opinion, the defendants are entitled to have the above question answered by a new grand jury.

[8, 9] The right to indictment by an unbiased grand jury is guaranteed by the Fifth Amendment. *Costello v. United States*, 350 U.S. 359, 76 S.Ct. 406, 100 L.Ed. 397 (1956). Proceedings before the grand jury are secret, ex-parte and for the most part under the exclusive control of the federal prosecutor. Because of concern for abuse inherent in grand jury proceedings, more and more courts are exercising their supervisory power over the administration of justice to regulate the manner in which grand

jury investigations are conducted. *E.g. United States v. Gonsalves*, 691 F.2d 1310 (9th Cir.1982), (affirmed District Court's dismissal of an indictment because of inherent unmanageability of cumbersome indictment); *United States v. Samango*, 607 F.2d 877 (9th Cir.1979); *In Re Grand Jury Proceedings*, 486 F.2d 85 (3d Cir.1973) (Schofield I); *United States v. Jacobs*, 547 F.2d 772 (2d Cir.1976), *cert. dismissed*, 436 U.S. 31, 98 S.Ct. 1873, 56 L.Ed.2d 53 (1978).

The Court's supervisory power as an independent basis for decision was first used in *McNabb v. United States*, 318 U.S. 332, 340-47, 63 S.Ct. 608, 612-16, 87 L.Ed. 819 (1943). In *McNabb*, the Court traced the origin of the tainted evidence doctrine to the Supreme Court's supervisory power. *Id.* at 341, 63 S.Ct. at 613. Also, in *United States v. Mesarosh*, 352 U.S. at 14, 77 S.Ct. at 8, the Court used its supervisory power to reverse a judgment of conviction and grant the petitioner a new trial. Moreover, the inherent supervisory power has been invoked to do justice under the particular facts alleged. *United States v. Samango*, 607 F.2d at 884.

[10] This supervisory power doctrine finds its origins in the complimentary principles of separation of powers and checks and balances. With regard to the above, the Court finds the following language from the recent *Gonsalves* case as helpful:

> Separation of powers relies on the implementation of an 'intellectual distinction' among the three major functions of government to . . . (prevent tyrannical use of power); accordingly the relevant case law is replete with assertions that the branches of government must be kept distinct and each must not interfere with the functioning of the others. In contrast, the doctrine of checks and balances buttresses the conceptual distinctions among the functions of government by providing for direct intervention by each branch into the functioning of the others; power can be checked only if it is shared . . . For historical, pragmatic and conceptual reasons, American scholars have tended to favor a theory of constitutional balance over the theory of separation of powers.

Gonsalves, 691 F.2d at 1318 *citing* Nagel, *Separation of Powers and Scope of Federal Equitable Remedies*, 30 Stan.L.Rev. 661, 682 (1978). Therefore, as noted in *Gonsalves* the source of the Court's supervisory power can be traced to Article III of the United States Constitution, and pursuant to Article III the judicial branch may review the operations of the executive and legislative branches. *Gonsalves*, 691 F.2d at 1318 *citing Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 2 L.Ed. 60 (1803).

[11] The prosecutor in these Miporn cases is an arm of the executive branch of the government. In this capacity, "he is responsible to his principal and the courts have no power over the exercise of his discretion . . . ." *United States v. Chanen*, 549 F.2d 1306, 1313 n. 5 *citing Newman v. United States*, 382 F.2d 479, 481 (U.S.App.D.C., 1967). Therefore, the Court must be ever vigilant not to interfere with the constitutionally based independence of the executive.

In this regard, the following standard has been applied:

> [G]iven the constitutionally-based independence of each of the three actors—court, prosecutor, and grand jury—we believe a court may not exercise its 'supervisory power' in a way which encroaches on the prerogatives of the other two unless there is a clear basis in fact and law for doing so. If the district courts were not required to meet such a standard, their 'supervisory power' could readily prove subversive of the doctrine of separation of powers.

549 F.2d at 1313. As heretofore noted throughout this opinion, both the facts and the law as applied herein amply support this Court's exercise of its supervisory power.

In this decision, the Court has attempted to present as best it can the true factual context within which it finds this case. Proceeding from that point, the Court's only concern is to reach the proper legal conclusion. That conclusion, in this Court's opinion, must be one most consistent with the concepts of fundamental fairness, due process and judicial integrity. With the above firmly in mind, in the interest of justice and pursuant to its supervisory powers, the Court does hereby

ORDER AND ADJUDGE that an order shall hereinafter be entered dismissing without prejudice each of the superseding indictments in *United States v. DiBernardo, et al.*, Case No. 80-56-Cr-EPS (S1-S16) and entering such other Orders as are appropriate in each case to dispose of all pending matters.[12]

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[12] The Orders of Dismissal contemplated in this opinion do not refer to cases 90-56-Cr-EPS (S3), (S12), (S14) and obviously (S9) (judgment of acquittal having heretofore been entered). As pertains to those cases the following action will hereinafter be taken by the Court: With regard to *United States v. Peraino, et al.*, 80-56-Cr-EPS (S3), the Court will issue a Rule to Show Cause why, even in light of the findings in this opinion, relief should be granted the Defendants as Special Agent Livingston did not testify at that trial; as pertains to *United States v. DiBernardo, et al.*, 80-56-Cr-EPS (S12), the Court will issue a Rule to Show Cause why under the circumstances of that case, Special Agent Livingston having testified, relief should not be granted; and finally with reference to *United States v. Bagnell*, 80-56-Cr-EPS (S14), defendant is granted 30 days by Order of this Court within which to file the appropriate Motion requesting the judgment and conviction heretofore entered be set aside.

APPENDIX C.

DISTRICT COURT OPINION; MARCH 18, 1983.

UNITED STATES of America,
Plaintiff,

v.

Robert "Debe" DiBERNARDO, et al.,
Defendants.

No. 80-56-Cr-EPS (S1-S8) (S10-S16).

United States District Court,
S.D. Florida,
Miami Division.

March 18, 1983.

MEMORANDUM OPINION AND ORDER ON MOTION FOR RECONSIDERATION

SPELLMAN, District Judge.

The Government has filed a Motion for Reconsideration relating to this Court's opinion of December 20, 1982 with regard to the dismissal without prejudice of the Miporn indictments (552 F.Supp. 1315). The Motion for Reconsideration in essence asserts four grounds:

"First, (it is asserted that) it appears that the Court found the Government attorneys were aware of Special Agent Livingston's psychological problems (at the time the matter was originally presented to the Grand Jury or at the time of the superseding indictments) and that they had an obligation to so inform the Grand Jury." The simple answer to that assertion is that the Court made no such finding.

Secondly, the Government appears to assert a lack of understanding by this Court of the grand jury process and proceeds to devote three pages of educational material in that regard. Although the Court appreciates the dissertation, the Court is fully aware of the function of a grand jury and the distinction between grand and petit juries.

Thirdly, the Government states that this Court's findings did not warrant dismissal of the indictments. This contention is basically broken up into two parts. First, the Government asserts that it was essential that this Court find either perjury or the strong probability of perjury before a dismissal would have been warranted. The second contention is that since the grand jury in question did in fact return three racketeering indictments which charge some of the original forty-five defendants with racketeering, that that justifies the evidence pertaining to violence, extortion, mafia dealing and organized crime. In addition, the Government states that the testimony pertaining to child pornography was justified because it was being investigated by that grand jury although the indictment was returned in Honolulu, Hawaii.

The Government fails to understand this Court's opinion as pertains to these contentions for three separate and distinct reasons. The assertion that it was necessary to dismissal for the Court to find actual perjury or strong probability thereof totally overlooks the duality of reasons upon which this Court's decision was based. If this Court's decision was based solely on Livingston's credibility, the assertion of the Government might be correct; but this Court found that the grand jury was tainted for two reasons. The Livingston liability did not stand alone. Coupled with the obvious psychological problems casting doubt on Agent Livingston's ability to testify truthfully before the grand jury was the extraneous evidence which is the subject matter of the Government's second assertion.[1] That second issue would have

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[1] This Court's opinion in 552 F.Supp. at pages 1319-1323 elaborately details the basis for this Court's concern regarding the possible psychological problems which would cause Livingston's grand jury testimony to be tainted. That dissertation together with the balance of the opinion and the Court's findings will not be reiterated in this Order.

been of no concern whatever to this Court had this matter proceeded on the original indictment charging forty-five defendants with one conspiracy since some of the thirteen defendants in question would have been included in those forty-five and might have had some bearing on the single nationwide conspiracy alleged in the original indictment. Such was not the case. The Government, at its own choosing, elected to file sixteen superseding indictments. There is no contention made that any of the defendants in question were included in all sixteen superseding indictments and a review of the three indictments in question clearly indicates the contrary.

Likewise there is no contention that such evidence, however, admissible for consideration by the grand jury in returning the original indictment, was in any way to be considered by the grand jury as pertains to those defendants not so labeled. Certainly such evidence had no bearing on the issue of obscenity as pertains to any of the defendants. This simple fact was never communicated to the grand jury in considering the superseding indictments. *That was a mistake.*

Last but not least is the underlying reason for dismissal. From neither of the above conclusions, standing alone, could there flow the determination by this Court that the indictments in question must be dismissed. Such was not the case. This Court's action in dismissing without prejudice these indictments was based on the realization that the issues could not be separated and that the "mistake" was coupled with the far more significant concern regarding Mr. Livingston's total credibility as a witness whether before the grand jury or otherwise.

The use by this Court of the heading "ABUSE OF THE GRAND JURY PROCESS" as the heading for the discussion under IIB of this Court's opinion of December 20, 1982 might in hindsight have been inappropriate and misleading. The heading for the entire analysis under Section II should have simply read "The Grand Jury was Tainted." The bottom line of the Court's opinion was that the grand jury had been "tainted".

Clearly, the uppermost concern in this Court's mind was Patrick J. Livingston, the witness. Having personally observed the witness, having heard the testimony and read the reports of the numerous medical experts and the conflicts spawned by the inconsistent statements of the "witness", this Court knew that it was confronted with problems seldom visited by any United States District Judge since the advent of the judiciary. A dedicated member of one of this country's finest law enforcement agencies, the F.B.I., had been reduced to a finding by this Court "that at present, Patrick J. Livingston would lie when the truth would serve him best" (552 F.Supp. at 1323).

Having reached that conclusion, the threshold criteria that these proceedings were tainted had been met. The question remaining for the Court was the degree and extent to which these proceedings had been tainted. If this Court's sole concern was the propensity of Agent Livingston to lie, then the Government's point might be well taken and this Court might very well have determined that the matter could be resolved by simply granting a new trial to those who could show that they had been harmed. Thereafter the Court could deal with the issue of his credibility in each ensuing trial.

Such a decision would have totally ignored evidence tending to indicate that Agent Livingston's problem in all likelihood existed at the time of the presentation of this case to the grand jury regardless of whether or not the Government knew such to be the case at the time. The obvious rationale for such a determination would be that although some harm may have resulted to the defendants, it could clearly be focused on before the petit jury when the issue of the credibility of the witness is under so much greater scrutiny. As pointed out by this Court "if presented only with the Livingston situation, this Court might be inclined to fashion some alternative remedy" (552 F.Supp. at 1324).

The Court in fashioning a remedy could not ignore the duality of the taint. It was at this point that the "mistake" heretofore alluded to by the Court when coupled with the Livingston situation caused this Court to reluctantly conclude that the taint was a complete one and one which cried out for this Court to exercise the inherent supervisory power vested in the judiciary to

preserve the essential judicial function of protecting the public interest in the even-handed administration of criminal justice.

There are those who would seek to read this Court's opinion (552 F.Supp. 1315) as a finding of fault by this Court of the actions of the prosecutor before the grand jury. Such is not the case. The circumstances surrounding this case will probably never occur again. It is true that this Court believes that a "mistake" was made as earlier alluded to. That mistake by itself would not have resulted in the conclusion reached. The picture ultimately painted of Patrick J. Livingston resulting in this Court's opinion of December 20, 1982 could never have been imagined in its totality in the early stages of these proceedings. Both of these facts, however, do not alter the conclusion that when coupled together the grand jury called upon to indict these defendants had become affected with corruption in the true biblical sense of that word and it, therefore, had become tainted.

The fourth ground asserted for reconsideration is directed toward three of the indictments returned in the case, one of which has already been tried by this Court. Those cases are *United States v. Peraino, et al.*, 80-56-Cr-EPS (S3), which case has been tried, defendants convicted and a motion for new trial is pending; *United States v. Guarino*, 80-56-Cr-EPS (S2) and *United States v. Boudreault, et al.*, 80-56-Cr-EPS (S4).

As to the *Peraino* case, Agent Livingston was not called as a witness by the Government or the defense. Although the Government was on notice of his shoplifting arrest, it did not notify the defendants of that fact as of the time of trial. As to the *Guarino* and *Boudreault* cases, Agent Ellavsky conducted almost the entire investigation as pertains to both cases although as to the former case Livingston appeared before the grand jury but his testimony consisted of the reading of investigative 302 reports of Ellavsky to the grand jury.

This argument has been raised for the first time before this Court. The Court should have the opportunity to review this matter based on the memoranda to be filed by the respective parties in light of this Order.

In *United States v. DiBernardo*, 80-56-Cr-EPS (S12) and *United States v. Bagnell*, 80-56-Cr-EPS (S14), the defendants have been convicted. As pertains to the defendant Bagnell, the Government agrees to the relief sought. The request of the Government as pertains to DiBernardo is to have an opportunity to be heard on why the Court's opinion of December 20, 1983 should not apply to said defendants and to respond to the defendants' motion for dismissal with prejudice.

Based upon the above and foregoing, it is

ORDERED AND ADJUDGED as follows:

1. That the Government's motion for reconsideration is GRANTED as follows:

A. That as pertains to the cases of *United States v. Guarino, et al.*, 80-56-Cr-EPS (S2); *United States v. Peraino, et al.*, 80-56-Cr-EPS (S3) and *United States v. Boudreault*, 80-56-Cr-EPS (S4), the Court does hereby take said motion for reconsideration under advisement and grants to all parties ten (10) additional days to file any supplemental memoranda as they desire in view of this Court's Order on Motion for Reconsideration.

B. That the Government is ORDERED to show cause within ten (10) days from the date of this Order why this Court's opinion should not apply to *United States v. DiBernardo, et al.*, 80-56-Cr-EPS (S12) and to respond to the defendants' motion for a dismissal with prejudice.

C. That as pertains to *United States v. Bagnell*, 80-56-Cr-EPS (S14), the Defendant Bagnell shall have thirty (30) days after final action by the United States Supreme Court on his pending petition for certiorari to file an appropriate motion with this Court relative to the relief he seeks from this Court in view of this Court's opinion of December 20, 1982 and the instant Order.

2. That the Government's motion for reconsideration as it pertains to all other pending indictments be and the same is hereby DENIED and simultaneous with the entry of this Order, this Court will enter orders dismissing without prejudice each of the following indictments: 80-56-Cr-EPS (S1), (S5), (S6), (S7), (S8), (S10), (S11), (S13), (S15) and (S16).

APPENDIX D.

DISTRICT COURT ORDER; JUNE 27, 1983.

UNITED STATES OF AMERICA,
Plaintiff,

v.

ROBERT "DEBE" DI BERNARDO
AND THEODORE "TEDDY" ROTHSTEIN,
Defendants.

No. 80-56-Cr-EPS (s12)

United States District Court
Southern District of Florida,

ORDER VACATING JUDGMENT OF CONVICTION AND DISMISSING CAUSE OF ACTION WITHOUT PREJUDICE AND DENYING CROSS-MOTION TO DISMISS WITH PREJUDICE

THIS CAUSE is before the Court on Motion For Reconsideration filed on behalf of the Government, Memorandum of DI BERNARDO and ROTHSTEIN In Opposition to the Government's Motion For Reconsideration and Cross-Motion to Dismiss with Prejudice and Memorandum, and Response thereto filed by the Government. Having reviewed the record and being otherwise duly advised, it is hereby

ORDERED AND ADJUDGED that based upon this Court's Opinion of December 20, 1982 and this Court's Order of March 18, 1983, the Judgment of Conviction in the above styled cause of action is vacated, and the cause of action be and the same is hereby dismissed without prejudice subject to being refiled pursuant to Title 18 U.S.C. § 3288, within 180 days from the entry of this Order. The Defendants' Cross-Motion to Dismiss with prejudice is DENIED. With regard to the Cross-Motion to Dismiss with prejudice, the Court finds there is not a sufficient basis in

law or fact for such a dismissal. As to dismissing the indictment without prejudice, the Court based such a dismissal on the duality of the taint involved in the case. The taint consisted of two prongs: the Livingston credibility *Mesarosh* reasoning and the presentation to the grand jury of extraneous irrelevant evidence.

As applied to defendants DI BERNARDO and ROTHSTEIN, this Court finds the duality of the taint fully applicable. Livingston testified before the grand jury and at trial with regard to these defendants. The Court also notes that at the trial of these defendants there was a significant inability on the part of the government to collaborate certain key statements which Livingston claimed these defendants made. Therefore, if for some reason this Court's decision with regard to dismissing the indictment of these defendants is reversed, there is no question in this Court's mind that the defendants DI BERNARDO and ROTHSTEIN would be entitled to a new trial.[1]

DONE AND ORDERED this 27th day of June, 1983.

UNITED STATES DISTRICT JUDGE

cc: Ralph J. Schwarz, Jr., Esq.,
Herald Price Fahringer, Esq.,
Fred A. Schwartz, Esq.,
Eleventh Circuit Court of Appeals

[1]*Mesarosh v. United States*, 352 U.S. 1 (1956).

APPENDIX E

U.S. CONSTITUTION, AMENDMENTS I and V

AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, *** nor be deprived of life, liberty, or property, without due process of law ***.

APPENDIX F

FEDERAL RULES OF CRIMINAL PROCEDURE, RULES 6(e) and 12

RULE 6(e)(2)

Rule 6. The Grand Jury

(e) Recording and Disclosure of Proceedings.

(2) **General Rule of Secrecy.** A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the government, or any person to whom disclosure is made under paragraph (3)(A)(ii) of this subdivision shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules. No obligation of secrecy may be imposed on any person except in accordance with this rule. A knowing violation of Rule 6 may be punished as a contempt of court.

RULE 12(b)(1)

Rule 12. Pleadings and Motions Before Trial; Defenses and Objections

(b) **Pretrial Motions.** Any defense, objection, or request which is capable of determination without the trial of the general issue may be raised before trial by motion. Motions may be written or oral at the discretion of the judge. The following must be raised prior to trial:

> (1) Defenses and objections based on defects in the institution of the prosecution;***.